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JOSEPH F. SPANIOL, JR.

Nos. 88-449, 88-513

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN F. HEALY, et al.,
Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
Intervenor-Appellants,
v.
THE BEER INSTITUTE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

JOSEPH I. LIEBERMAN
Attorney General
ROBERT F. VACCHELLI*
RICHARD M. SHERIDAN
Assistant Attorneys General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Telephone: (203) 566-7570
Attorneys for Appellants John F. Healy, David L. Snyder and Charles Kasmer
*Counsel of Record

(List of Counsel continued on inside front cover.)

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JEFFREY I. GLEKEL*
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, N.Y. 10022
Telephone: (212) 735-3000
Attorney for Appellee
Anheuser-Busch, Inc.

Of Counsel:
Timothy G. Reynolds
Gary B. Friedman

JEROME I. CHAPMAN*
ARNOLD & PORTER
1200 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 872-6700
Attorney for Appellee
Miller Brewing Company

Of Counsel:
Wayne C. Holcombe

WILLIAM H. ALLEN*
COVINGTON & BURLING
1201 Pennsylvania, N.W.
Washington, D.C. 20044
Telephone: (202) 662-6000
Attorney for Appellees
The Beer Institute,
G. Heilman Brewing Company,
The Genessee Brewing
Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing
Company, Inc.,
Monterey Bay Company,
Inc., and
Van Munching and Company, Inc.

GARY NATEMAN, ESQ.
THE BEER INSTITUTE
1225 Eye Street, N.W.
Washington, D.C. 20005
Telephone: (202) 737-2337
Attorney for Appellee
The Beer Institute

WILLIAM A. WECHSLER*
ALFRED F. WECHSLER
GREGORY J. SOUTHWORTH
BAILEY AND WECHSLER
66 Forest Street
Hartford, CT 06105
Telephone: (203) 525-9191
Attorneys for
Intervenor-Appellants
Wine and Spirits Wholesalers
of Connecticut, Inc.,
Johnny Barton, Inc.,
The Brescome Distributor Corp.,
Connecticut Distributors, Inc.,
Eder Bros., Inc.,
Gallo Wine Merchants, Inc.,
Allan S. Goodman, Inc., and
Hartley and Parker Limited, Inc.

*Counsel of Record

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APPENDIX A

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

July 25, 1984 — Complaint for Declaratory Judgment and Injunctive Relief filed in the United States District Court, District of Connecticut (Hartford) by Appellees The Beer Institute (formerly the United States Brewers Ass'n) et al. ("Brewers")

August 30, 1984 — Answer, Motion for Summary Judgment, Statement of Material Facts Not in Dispute, Affidavit and Brief filed by Appellants John F. Healy, et al. ("Connecticut")

September 19, 1984 — Answer, Motion to Intervene filed by Intervenor-Appellants Wine and Spirits Wholesalers of Connecticut, Inc. ("Wholesalers")

October 16, 1984 — Wholesalers' Motion to Intervene granted.

November 30, 1984 — Notice of Brewers' First Set of Interrogatories filed.

January 10, 1985 — Connecticut's Answer to Interrogatories filed.

January 17, 1985 — Wholesalers' Answer to Interrogatories filed.

February 13, 1985 — Wholesalers' Brief in Support of Connecticut's Motion for Summary Judgment filed.

February 13-14, 1985 — Brewers' Cross-Motion for Partial Summary Judgment, Statement of Material Facts and Brief filed.

March 6, 1985 — Connecticut's Response to Brewers' Statement of Facts and Reply Brief filed.

March 26, 1985 — Brewers' Reply Brief filed.

June 23, 1986 — Brewers' Supplemental Brief filed.

June 27, 1986 — Connecticut's Supplemental Brief filed.

July 30, 1986 — Wholesalers' Supplemental Brief filed.

September 11, 1987 — Ruling on Cross-Motions for Summary Judgment filed by the District Court.

September 15, 1987 — Judgment for Connecticut filed by the District Court.

October 13, 1987 — Notice of Appeal to the United States Court of Appeals for the Second Circuit filed by Brewers.

December 1, 1987 — Record on Appeal filed.

December 9, 1987 — Brewers' Brief on appeal and Joint Appendix filed.

December 31, 1987 — Connecticut's Brief on appeal filed.

January 6, 1988 — Wholesalers' Brief on appeal filed.

January 19, 1988 — Brewers' Reply Brief filed.

June 13, 1988 — Judgment and Published Opinion of the Court of Appeals filed reversing decision of the District Court.

June 29, 1988 — Notice of Appeal to the Supreme Court of the United States filed by Connecticut.

July 7, 1988 — Notice of Appeal to the Supreme Court of the United States filed by Wholesalers.

September 8, 1988 — Mandate of the Court of Appeals issued.

September 12, 1988 — Jurisdictional Statements filed by Connecticut and Wholesalers in the Supreme Court of the United States.

September 20, 1988 — Judgment on remand pursuant to mandate entered by the District Court.

October 14, 1988 — Motion for Summary Affirmance filed by Brewers in the Supreme Court of the United States.

November 8, 1988 — Supplemental Brief filed by Connecticut.

November 9, 1988 — Supplemental Brief filed by Wholesalers.

November 14, 1988 — Probable Jurisdiction Noted and appeals consolidated by the Supreme Court of the United States.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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UNITED STATES BREWERS ASSOCIATION, INC., as an association, and on behalf of its following members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York and Rhode Island:

ANHEUSER-BUSCH, INC., CHAMPALE, INC., CHRISTIAN SCHMIDT BREWING COMPANY, LATROBE BREWING COMPANY, PABST BREWING COMPANY, THE STROH BREWERY COMPANY;

ANHEUSER-BUSCH INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY, INC.; MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC.; GUINESS-HARP CORP.; LABATT IMPORTERS, INC.; MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.,

Plaintiffs,

— against —

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control,

Defendants.

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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs for their complaint in this action allege as follows:

Nature of This Action

1. This is an action for a declaratory judgment that the beer price affirmation provisions of Connecticut Pub. Act 84-332, Pub. Act 84-432 and Section 30-63a(b) of the Connecticut Liquor Control Act are unconstitutional, and for an injunction prohibiting defendants from enforcing those provisions.

2. The declared purpose of Pub. Act 84-332 is to conform to the decision of the United States Supreme Court in *United States Brewers Association, Inc. v. Healy*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 104 S. Ct. 265 (1983) ("*Healy*"), which invalidated a 1981 Connecticut beer price affirmation scheme as violative of the Commerce Clause of the United States Constitution. The revised legislation, however, fails to achieve its stated objective. Pub. Act 84-332, in conjunction with Pub. Act 84-432 and Section 30-63a(b) of the Connecticut Liquor Control Act (which was not amended or repealed by the Legislature), requires all brewers and importers of beer to sell their products to Connecticut wholesalers at a price that is fixed prior to the beginning of each month and thereafter may not be changed throughout the month, and mandates that that fixed sale price may be no "higher than the lowest price at which such item of beer is then being sold . . . to any wholesaler . . . in any state bordering [Connecticut]." Thus, the new affirmation scheme effectively regulates future prices in New York, Massachusetts and Rhode Island (the "Border States") in the very same manner as was invalidated in *Healy*.

3. The beer price affirmation provisions also are a classic example of protectionist legislation designed to insulate Connecticut beer wholesalers and retailers from vigorous existing competition with wholesalers and retailers in the Border States. Connecticut has made it a criminal violation for a brewer or importer which is selling its products in Connecticut

to offer those products to any wholesaler in the Border States at a price lower than the price offered in Connecticut, without any regard to competitive conditions in the Border States. Enforcement of these provisions, unless enjoined by this Court, inevitably will have the intended effect of eliminating interstate and regional competition in beer sales to the detriment of the plaintiffs and constitute an undue burden on interstate and foreign commerce in violation of the Commerce Clause of the Constitution of the United States.

4. The beer price affirmation provisions place severe burdens upon the ability of brewers, importers and wholesalers and retailers in the Border States to engage in interstate commerce which violate the Commerce Clause of the Constitution of the United States.

5. The beer price affirmation provisions additionally violate the Supremacy Clause of the United States Constitution by requiring conduct more fully described below which, if engaged in by any group of brewers and importers otherwise than under mandate of law, would violate Section 1 of the Sherman Act, 15 U.S.C. § 1.

Jurisdiction and Venue

6. This Court has subject matter jurisdiction over this action pursuant to:

(a) 28 U.S.C. § 1331(a), because the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States; and

(b) 28 U.S.C. § 1337, because this action arises under acts of Congress regulating commerce and protecting trade and commerce against restraints and monopolies.

7. Venue in this district is proper pursuant to 28 U.S.C. § 1391(b) because the claim arises and defendants reside in this district.

The Parties

8. Plaintiff United States Brewers Association, Inc. ("USBA") is a non-profit corporation organized and existing under the laws of the State of New York, with its principal place of business in Washington, D.C., of which 39 companies that brew beer in the United States are members and 23 companies that import and sell in the United States beer brewed outside the United States are affiliated members. Domestic brewer members of the USBA that do business in Connecticut and one or more of the states bordering Connecticut, on whose behalf USBA sues are:

(a) Anheuser-Busch, a corporation organized and existing under the laws of the State of Missouri, with its principal place of business in Missouri;

(b) Champale, Inc., a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in New Jersey;

(c) Christian Schmidt Brewing Company, a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pennsylvania;

(d) Latrobe Brewing Company, a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pennsylvania;

(e) Pabst Brewing Company, a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Wisconsin;

(f) The Stroh Brewery Company, a corporation organized and existing under the laws of the State of Arizona with its principal place of business in Michigan.

9. Plaintiff Anheuser-Busch, Inc. is described in paragraph 8(a) above.

10. Plaintiff The Genesee Brewing Company, Inc. is a corporation organized and existing under the laws of the State of New York with its principal place of business in New York.

11. Plaintiff G. Heileman Brewing Company, Inc. is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Wisconsin.

12. Plaintiff Miller Brewing Company is a corporation organized and existing under the laws of the State of Wisconsin, with its principal place of business in Wisconsin.

13. Plaintiff All Brand Importers, Inc. is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York.

14. Plaintiff Dribeck Importers, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Connecticut.

15. Plaintiff Guiness-Harp Corporation is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York.

16. Plaintiff Labatt Importers, Inc. is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York.

17. Plaintiff Martlett Importing Company, Inc. is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York.

18. Plaitiff Monterey Bay Company, Inc. is a corporation organized and existing under the laws of the State of California with its principal place of business in New York.

19. Plaintiff Van Munching Company, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York.

20. None of the members of plaintiff USBA named in paragraph 8 owns or operates a brewery in Connecticut. None of the plaintiff brewers or importers named in paragraphs 9 through 19 owns or operates a brewery in Connecticut.

21. On information and belief, defendant John F. Healy is a resident and citizen of Connecticut. In his official capacity as a Commissioner and Chairman of the Department of Liquor Control he is charged with responsibility for enforcing the beer price affirmation provisions.

22. On information and belief, defendant David L. Snyder is a resident and citizen of Connecticut. In his official capacity as Commissioner of the Department of Liquor Control, he is charged with responsibility for enforcing the beer price affirmation provisions.

23. On information and belief, defendant Charles Kasmer is a citizen and resident of Connecticut. In his official capacity as the Secretary of the Department of Liquor Control he administers many of the day-to-day affairs of the Department including, on information and belief, enforcement of the beer price affirmation provisions.

The Beer Industry in Connecticut And The Border States

24. There are essentially three tiers of distribution for beer in Connecticut and the Border States: (i) the brewers and importers; (ii) the wholesalers; and (iii) the retail outlets.

25. The brewers and importers of beer generally market their brands in one of two loosely defined categories: national brands such as Budweiser or Miller High Life, which are marketed and promoted nationwide, and regional or local brands such as Genesee Cream Ale and Piels, which are generally promoted within limited geographic regions of the country. There are no breweries within the State of Connecticut and all beer, whether national or regional, is shipped into

Connecticut by brewers and importers from out of state, which are designated as out-of-state shippers under Connecticut law. Unless otherwise indicated, the term "out-of state shippers" refers to all brewers and importers including all plaintiffs herein, other than the USBA.

26. The prices charged and package configurations offered by out-of-state shippers to wholesalers in Connecticut, New York, Massachusetts and Rhode Island vary from market to market within that four state area. In certain markets, regional brewers or importers price their beers at levels that allow their wholesalers to create the lowest consumer prices possible in the geographic areas in which their products are sold. As a result, other brewers or importers electing to compete in those areas have to consider this competitive pricing when making their own price decisions. Other factors which have an impact on pricing and marketing decisions, such as consumer tastes, packaging costs and freight, also vary from area to area even within these states. Thus, a variable pricing and marketing structure has emerged which results in substantial interstate competition in retail beer sales.

27. In Connecticut there is typically more than one wholesaler for an out-of-state shipper's products. Each wholesaler generally handles products from more than one competing out-of-state shipper but is restricted, by Connecticut law, from selling to retailers outside its geographical territory both within and outside of Connecticut.

28. The primary off-premise retail outlets for beer in Connecticut are package stores and grocery stores. Retailers, particularly those near the Connecticut border, face substantial competition from retail beer outlets in the Border States. Many Connecticut residents historically have traveled to New York, Massachusetts or Rhode Island to purchase beer. The Connecticut Legislature's motivation in enacting the original beer price affirmation provisions was a desire to halt this interstate competition by discouraging, through lower

Connecticut prices, out-of-state purchases of beer by Connecticut residents. The recent amendments to those provisions contained in Pub. Act 84-332 were considered by the Legislature as mere technical amendments to the law in an attempt to comply with *Healy* and thus the purpose of the beer price affirmation provisions remains the same.

The Original Beer Price Affirmation Scheme And Healy

29. In 1981, Connecticut for the first time enacted a statute designed to impose price affirmation upon out-of-state shippers of beer. The beer price affirmation scheme, however, was invalidated by the United States Court of Appeals for the Second Circuit in *Healy*, 692 F.2d 275 (2d Cir. 1982), which was affirmed by the United States Supreme Court, 104 S. Ct. 265 (1983).

30. Under the original law, an out-of-state shipper was required, on a monthly basis, to post the prices it would charge to Connecticut wholesalers during the following month. The posted prices were "controlling" or fixed prices and could not be changed by the out-of-state shipper during the posted period.

31. Along with the posting, the out-of-state shipper was required to affirm under oath that the posted prices would be no higher than the lowest prices it would charge in the Border States during the next month. Furthermore, under Section 30-63a(b), an out-of-state shipper was prohibited from selling its product to a Connecticut wholesaler at a price which was higher than the lowest price then being charged to any wholesaler in a Border State.

32. In *Healy*, the USBA and certain other plaintiffs named herein challenged the former Connecticut law, *inter alia*, as being violative of the Commerce Clause of the Constitution of the United States. The Second Circuit held that because the affirmation scheme not only set future maximum prices in Connecticut each month but also necessarily

established the future minimum prices for each particular product in the Border States, it impermissibly restricted the freedom of the out-of-state shipper to change its prices in the Border States. Since, as the Court noted, the state of Connecticut had no legitimate interest in regulating out-of-state prices, the Court declared that the entire legislative scheme constituted a violation of the Commerce Clause and was unconstitutional. The United States Supreme Court affirmed.

The Beer Price Affirmation Provisions of Public Acts 332 and 432

33. Pub. Acts 84-332 and 84-432 were passed by the Connecticut Senate on April 18 and May 7, 1984 and by the House of Representatives on May 3 and 9, 1984, respectively. Pub. Act 84-432 was signed by Governor O'Neill on June 13, 1984 and Pub. Act 84-332 was signed by Governor O'Neill on June 14, 1984. A copy of Pub. Act 84-332 is annexed hereto as Exhibit A, and a copy of Pub. Act 84-432 is annexed hereto as Exhibit B. The Acts, in combination with existing law which has not been repealed or amended, impose direct restrictions on the future prices which out-of-state shippers can charge to Border State wholesalers.

34. Section 1 of Pub. Act 84-332, which amends Section 30-63 of the Liquor Control Act, requires, like the original law, each out-of-state shipper to post, on a monthly basis, the bottle, can, case, keg and barrel price of any brand of goods it offers in Connecticut. Those posted prices, "when so posted shall be the controlling price[s] for such . . . out-of-state permittee for the month following such posting."

35. In conjunction with the posting, section 3 of Pub. Act 332, which amends Section 30-63b(b) of the Liquor Control Act, requires that an out-of-state shipper must "file with the department of liquor control a written affirmation under oath . . . certifying that at the time of posting the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest

price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such . . . out-of-state shipper to any wholesaler in any state bordering this state."

36. Section 30-63a(b) of the Liquor Control Act, which was not amended, and remains in full force and effect, provides that:

> "no holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, *higher than the lowest price at which such item is then being sold* or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper *to any wholesaler in any state bordering this state*." (emphasis added)

37. Although Section 3(c) of Pub. Act 84-332, which creates a new Section 30-63(e) of the Liquor Control Act, declares that the affirmation requirement does not prohibit an out-of-state shipper from changing prices in the Border States, the interaction of the posting and affirmation provisions of Pub. Act 84-332 with Section 30-63a(b) of the Liquor Control Act not only limits the price at which out-of-state shippers may sell to Connecticut wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month. Thus, as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price.

38. Section 4 of Pub. Act 84-332, which amends Section 30-63c(b) of the Liquor Control Act, requires that in determining the lowest price at the time of posting as to which affirmation must be made "appropriate reductions" will be made for all "discounts, rebates, free goods, allowances and other

inducements of any kind whatsoever, including depletion and floor-stock allowances." The only differentials in price permitted are those relating to differences in state taxes and fees and the "actual cost" of delivery. No consideration of variations in competitive conditions is permitted.

39. Pub. Act 84-432, which was passed after Pub. Act 84-332, appears to amend Section 30-63c(b) to require that the "lowest price" in the Border States, as previously described in paragraph 38, be determined with respect to prices offered in the Border States not at the time of posting but rather, during the period covered by the posting — the succeeding month.

40. Finally, the beer price affirmation provisions not only mandate the price at which beer must be sold in Connecticut and below which it cannot be sold in the Border States, but Section 30-63c(b), as further amended by Pub. Act 84-432, also requires that each out-of-state shipper of beer "shall offer to Connecticut wholesalers all of the sizes and packages approved by the Department of Liquor Control, of his brand which he offers to any wholesaler in any state bordering this state."

The Effect of the Beer Price Affirmation Provisions on Interstate Commerce

41. The most immediate effect of the newly renovated beer price affirmation provisions is to regulate or fix future minimum prices for beer in the Border States. This extraterritorial regulation results from the continuation of the requirements that (a) an out-of-state shipper must post in advance and thereby fix its future prices in Connecticut for each month and (b) an out-of-state shipper thereafter may not sell its products during that succeeding month in Connecticut at a price higher than the lowest price then being charged in a Border State.

42. Furthermore, the beer price affirmation provisions will make it much more difficult for beer wholesalers and

retailers in the Border States to compete in interstate commerce with Connecticut wholesalers and retailers for sales to Connecticut consumers. The new law mandates that whatever the price charged to Connecticut wholesalers, the price charged in the Border States must be equal or higher, never lower. Accordingly, the statute, on its face, poses a virtually insurmountable restraint on the ability of Border State wholesalers and retailers to compete effectively with Connecticut wholesalers and retailers.

43. The statute also imposes very serious burdens on the ability of out-of-state shippers who offer their products in Connecticut to price and market their products in the Border States, including, among others, the following restrictions:

(a) The requirement that the price posted by an out-of-state shipper and offered to all Connecticut wholesalers must not exceed the lowest price offered by it anywhere in any Border State will severely burden and inhibit the pricing decisions made by out-of-state shippers. Out-of-state shippers cannot offer future short term price promotions in limited geographical areas within the Border States or future lower prices to meet localized competition (such as competition from regional breweries), if such promotions or price reductions would result in the lowest price in the Border States, unless that lowered price is also offered throughout Connecticut for the next full month.

(b) The requirement that all sizes and packages of a product offered in any Border State must be offered throughout Connecticut also imposes severe burdens on the economic conduct of brewers outside the State of Connecticut. This provision makes it virtually impossible to conduct test marketing in the states of Rhode Island, Massachusetts and New York, which historically contain some of the most popular test markets in the Northeast, since any new product package or size test marketed in those states would have to be offered throughout the State of Connecticut, thereby defeating the purpose of a limited "test" market. Additionally, in order to

comply with the arbitrary "all sizes and packages" requirement, the out-of-state shippers would be required to incur substantial expense in supplying all of their packages and sizes in Connecticut.

Count I

[Violation of the Commerce Clause]

44. Plaintiffs repeat and reallege each of the preceding paragraphs as if fully set forth herein.

45. The beer price affirmation provisions, by tying the out-of-state shippers' future prices in Connecticut to their future prices in the Border States, regulate or fix the minimum prices they may charge in the Border States and thereby prohibit out-of-state conduct in violation of the Commerce Clause of the United States Constitution, Article I, Section 8, cl. 3.

46. Plaintiffs have no adequate remedy at law.

Count II

[Violation of the Commerce Clause]

47. Plaintiffs repeat and reallege each of the preceding paragraphs as if fully set forth herein.

48. The beer price affirmation provisions were enacted by the Connecticut legislature for the purpose, and will have the intended effect, of protecting and insulating Connecticut retail and wholesale sellers of beer against competition from retail and wholesale sellers of beer in the Border States, thereby creating an unconstitutional burden on interstate commerce, and violating the Commerce Clause of the United States Constitution, Article I, Section 8, cl. 3, and 42 U.S.C. § 1983.

49. Plaintiffs have no adequate remedy at law.

Count III

[Violation of the Commerce Clause]

50. Plaintiffs repeat and reallege each of the preceding paragraphs as if fully set forth herein.

51. Enforcement of the beer price affirmation provisions will (i) eliminate the ability of out-of-state shippers to sell beer to Border State wholesalers at prices and in packages required by competitive market conditions; (ii) restrict the ability of out-of-state shippers to conduct test marketing or promotional campaigns in the Border States; (iii) cause out-of-state shippers to incur substantial unjustified expenses to comply with the law's "all sizes and packages" requirements; (iv) restrict the ability of out-of-state shippers, wholesalers and retailers to compete in interstate commerce; and (v) impose other substantial burdens and restraints on interstate commerce, all in violation of the Commerce Clause of the United States Constitution, Art. I, Section 8, cl. 3.

52. Plaintiffs have no adequate remedy at law.

Count IV

[Violation of the Supremacy Clause]

53. Connecticut's beer price affirmation provisions, in conjunction with Connecticut's price posting requirements, require that all out-of-state shippers doing business in Connecticut and in one or more of the Border States must establish prices below which they will not sell beer to wholesalers in any Border State where they do business, which prices must be equal to or higher than the Connecticut posted price for each item of beer, and require further that the out-of-state shippers must maintain those minimum sale prices for the calendar-month-long periods mandated by the Connecticut price posting requirements.

54. There are certain local markets for beer that encompass parts of Connecticut and parts of one or more of the Border States. In each of these markets straddling the Connecticut border, Connecticut wholesalers are in competition with wholesalers in a Border State. Connecticut's beer price affirmation provisions prevent out-of-state shippers doing business in Connecticut and in one or more of the Border States from dealing with the wholesalers in a Border State who are in competition with Connecticut wholesalers on terms that are more favorable than the terms offered to the competitor Connecticut wholesaler, irrespective of competitive conditions.

55. Massachusetts' price law requires out-of-state shippers to post before the first day of the month the prices to be charged to Massachusetts wholesalers effective on the first day of the subsequent month. Those Massachusetts posted prices are, by law, publicly available information. Connecticut's price posting laws require out-of-state shippers on a monthly basis to post the prices to be charged to wholesalers effective on the first day of the subsequent month. Connecticut's beer price affirmation provisions therefore require that out-of-state shippers post in Massachusetts before the first day of the month prices that, under Connecticut law, may not be exceeded by the prices that will be posted in Connecticut later that month. Thus, the effect of the beer price affirmation provisions is to require brewers and importers doing business in both Massachusetts and Connecticut to make publicly available their future maximum prices for Connecticut.

56. The conduct required of all out-of-state shippers doing business in Connecticut and in one or more of the Border States as described in paragraphs 53–55 — i.e., the establishment and maintenance of minimum prices for each item of beer in a four-state area, the obligation not to deal with certain of their customers except on the same terms or more favorable terms as they deal with other customers, and the posting and public availability in one state of maximum future prices to be charged elsewhere — would, if engaged in by any such

group of out-of-state shippers otherwise than under mandate of law, violate Section 1 of the Sherman Act, 15 U.S.C. § 1. Therefore, the beer price affirmation provisions contravene the Supremacy Clause of the United States Constitution, Act. IV, cl. 2.

COMPLIANCE WITH THE BEER PRICE AFFIRMATION PROVISIONS WILL IRREPARABLY INJURE PLAINTIFFS

57. Compliance with the beer affirmation provisions will immediately and irreparably injure plaintiffs in that it will severely disrupt, inhibit and injure their ability to make pricing and marketing decisions in response to competitive conditions in the Border States, disrupt their relationships with wholesalers, retailers and consumers in Connecticut and the Border States, unduly burden the conduct of their business and cause plaintiffs to suffer substantial damages in an amount not reasonably susceptible of being calculated.

WHEREFORE, plaintiffs, having no adequate remedy at law, respectfully request that this Court:

(a) declare and adjudge that the beer price affirmation provisions unduly burden interstate commerce in violation of the Commerce Clause of the United States Constitution and thus are null and void;

(b) declare and adjudge that the beer price affirmation provisions, being in conflict with the provisions of the Sherman Act, are in violation of the Supremacy Clause of the United States Constitution and thus are null and void;

(c) temporarily restrain, preliminarily enjoin and permanently enjoin the defendants, their successors in office, their agents, servants, employees and attorneys as well as all persons in active concert or participation with them from taking any action whatsoever to enforce or apply the beer price affirmation provisions and any orders, rules or regulations issued pursuant thereto, against plaintiffs in connection with their sales of beer in Connecticut or any other state; and

(d) grant such other and further relief as the Court shall deem just and proper.

Dated: Hartford, Connecticut
July , 1984

DAY, BERRY & HOWARD

By _____
(A Member of the Firm)
City Place
Hartford, Connecticut 0613-3499
(203) 275-0100
Attorneys for Plaintiffs

SKADDEN, ARPS, SLATE, MEAGHER & FLOM

By /s/ [signature illegible]
(A Member of the Firm)
919 Third Avenue
New York, New York 10022
Attorneys for Plaintiff
Anheuser-Busch, Inc.

ARNOLD & PORTER

By /s/ [signature illegible]
(A Member of the Firm)
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorneys for Plaintiff
Miller Brewing Co.

COVINGTON & BURLING

By /s/ William H. Alle
(A Member of the Firm)
1201 Pennsylvania, N.W.
Washington, D.C. 20044
Attorneys for Plaintiffs
United States Brewers Association, Inc.,
G. Heilman Brewing Company,
The Genesee Brewing Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers, Inc.,
Martlett Importing Company, Inc. and
Monterey Bay Company, Inc.; and
Van Munching Company, Inc.

GARY NATEMAN, ESQ.

/s/ Gary Nateman
United States Brewers Association, Inc.
1750 K. Street N.W.
Washington, D.C. 20006
Attorneys for Plaintiff
United States Brewers Association, Inc.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

ANSWER

FIRST DEFENSE

Count I

1. The Defendants admit the allegations in paragraphs 1, 8-24, and 29-31.

2. The Defendants deny the allegations in paragraphs 3-7, 39, 41-43, 45 and 46.

3. As to paragraph 2, the Defendants admit the first sentence. The rest and remainder of the paragraph is denied.

4. As to the allegations in the first sentence of paragraph 25, the Defendants do not have sufficient knowledge upon which to form a belief and leave Plaintiffs to the proof thereof. The rest and remainder of the paragraph is admitted.

5. As to paragraph 26, the Defendants do not have sufficient knowledge upon which to form a belief and leave Plaintiffs to the proof thereof.

6. As to paragraph 27, the Defendants admit the allegations with respect to beer, but note that any geographic territorial limits within Connecticut imposed on Connecticut wholesalers are established at the choice of the appointing out-of-state shipper pursuant to C.G.S. Sec. 30-63(a) and Sec. 30-6-B7 of the Regulations of Connecticut state agencies.

7. As to paragraph 28, the first three sentences are admitted. The rest and remainder of the paragraph is denied.

8. Paragraph 32 is denied inasmuch as it is argumentative and interprets court decisions which speak more accurately for themselves.

9. As to paragraph 33, the last sentence is denied. The rest and remainder of the paragraph is admitted.

10. As to paragraph 34, the Defendants, essentially, admit the paragraph except to note that Public Act 84-332 added new language that prices be posted "on a monthly basis" and to note that the law does not employ the term "goods".

11. As to paragraph 35, the Defendants essentially admit the allegation with the exception that the actual language used by the legislature, identifying deletions (in brackets) and additions (in capital letters) is as follows:

> (b) At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. [, at any time during the calendar month covered by such posting.]

12. That portion of paragraph 36 which reads ". . . which was not amended, and remains in full force and effect . . ." is denied. The rest and remainder of the paragraph is admitted.

13. As to paragraph 37, that portion which reads ". . . Section 3(c) of Pub. Act 84-332, which creates a new Section 30-63(e) of the Liquor Control Act, declares that the affirmation requirement does not prohibit an out-of-state shipper from changing prices in the Border States, . . ." is admitted. The rest and remainder of the paragraph is denied.

14. As to paragraph 38, the last sentence is denied. The rest and remainder of the paragraph is admitted.

15. As to paragraph 40, that portion which reads, "Finally, the beer price affirmation provisions not only mandate the price at which beer must be sold in Connecticut and below which it cannot be sold in the Border States . . ." is denied. The rest and remainder of the paragraph is admitted.

16. The Defendants' answers to paragraph 1-43 are hereby incorporated and made Defendants' answer to paragraph 44.

Count II

1. The Defendants' answers to paragraphs 1-46 of Count I are hereby incorporated and made Defendants' answer to paragraph 47.

2. Paragraphs 48 and 49 are denied.

Count III

1. The Defendants' answers to paragraphs 1-49 of Counts I and II are hereby incorporated and made Defendants' answer to paragraph 50.

2. Paragraphs 51 and 52 are denied.

Count IV

1. Paragraph 53, 54 and 56 are denied.

2. As to the first two sentences of paragraph 55, the Defendants do not have sufficient knowledge upon which to form a belief and leave Plaintiffs to the proof thereof. The third sentence is admitted. The rest and remainder of said paragraph is denied.

Irreparable Injury

1. Paragraph 57 is denied.

SECOND DEFENSE

1. The Complaint fails to state a claim against the Defendants upon which relief can be granted.

2. The beer price affirmation provisions, as amended, do not control prices at which beer may be sold outside of the state, in violation of the Commerce Clause of the U.S. Constitution.

3. The beer price affirmation provisions, as amended, do not create a statutory mechanism which protects against interstate competition in violation of the Commerce Clause of the U.S. Constitution.

4. The beer price affirmation provisions, as amended, do not create a statutory mechanism which imposes an undue and excessive burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

5. Inasmuch as the beer price affirmation provisions are not yet in effect, this case is in the same posture as the case of *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 US 35 (1966) and should be likewise dismissed.

6. Plaintiffs have presented no facts which demonstrate that the beer price affirmation provisions, as applied in this case, constitute an unlawful burden on interstate commerce.

7. The State interests in this case, embodied in the beer price affirmation provisions as amended by the Connecticut General Assembly pursuant to the Twenty-first Amendment of the U.S. Constitution outweigh the purported interests of the Plaintiffs allegedly protected by the Commerce Clause of the U.S. Constitution.

THIRD DEFENSE

1. The Complaint fails to state a claim against the Defendants upon which relief can be granted.

2. The beer price affirmation provisions, as amended, do not create a statutory mechanism which is violative of the Sherman Act or the Supremacy Clause of the U.S. Constitution.

3. The beer price affirmation provisions, as amended, establish a statutory mechanism which is immune from the Sherman Act under the State Action Immunity Doctrine, also referred to as the Parker v. Brown Doctrine.

FOURTH DEFENSE

1. The Complaint fails to state a claim against the Defendants upon which relief can be granted.

2. The beer price affirmation provisions, as amended and as interpreted by the Connecticut Department of Liquor Control, correct the deficiencies which caused the former law to be held unconstitutional in *U.S. Brewers Ass'n v. Healy*, 692 F.2d 275 (2nd Cir., 1982), aff'd 104 S.Ct. 265 (1983).

FIFTH DEFENSE

1. In the alternative, the court should stay action in this case with respect to the Commerce Clause under the doctrine of abstention since the case presents a question of statutory interpretation of first impression arising under the Connecticut Liquor Control Act which should first be resolved in the State Supreme Court and the resolution of which would obviate this constitutional question.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
Newington, Conn. 06111
Tel: 566-7570

BY R. Langer /s/ LFM

Robert M. Langer
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
Tel: 566-5374

[Affidavit of Service omitted in printing]

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND, IN THE ALTERNATIVE, MOTION FOR STAY

The Defendants respectfully move, pursuant to Rule 56 of the Federal Rules of Civil Procedure and upon the memorandum, affidavit and other documents filed or referred to by the Defendants, that Summary Judgment be entered for the Defendants on the grounds that:

There is no general issue of material fact that, Public Act 84-332, Public Act 84-432 and C.G.S. Sec. 30-63a(b), concerning the beer price affirmation provisions of the Connecticut Liquor Control Act, as interpreted by the Connecticut Liquor Control Commission:

1. Do not violate the Commerce Clause of the United States Constitution, Article I, Section 8, clause 3; and

2. Do not violate Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, or the Supremacy Clause of the U.S. Constitution, Article IV, clause 2; or are immune from the Sherman Act.

In the alternative, we move for an order staying further proceedings in this case, with respect to the Commerce Clause issues only, pursuant to the doctrine of abstention.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
P.O. Box 11424
555 Russell Road
Newington, Conn. 06111
Tel: 566-7570

BY R. Langer /s/ LFM

Robert M. Langer
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
Tel: 566-5374

[Certificate of Service omitted in printing]

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

AFFIDAVIT

State of Connecticut)
) ss: Hartford August 30, 1984

County of Hartford

We, the undersigned, John F. Healy, Chairman, and David L. Snyder, Commissioner, being duly sworn, do depose and say:

1. We are over the age of 21 and believe in the obligation of an oath.

2. We comprise the Commissioners of the Department of Liquor Control of the State of Connecticut.

3. As such Commissioners we are empowered, pursuant to Sec. 30-6 Connecticut General Statutes, to enforce the provisions of the Connecticut Liquor Control Act. We are further empowered by said section to do whatever is reasonably necessary for the carrying out of the intent of said Liquor Control Act.

4. We make this affidavit in order that the United States District Court, and all others concerned and/or affected, may have certain knowledge of the manner in which this department shall interpret and implement Public Act 84-332; Public Act 84-432; and C.G.S. Sec. 30-63a(b). The contents of this affidavit constitutes a declaratory ruling of the Department

of Liquor Control pursuant to the provisions of C.G.S. Sec. 4-176.

5. We hereafter set forth, in a construct keyed to the allegations of the complaint in the above captioned matter, our official interpretation of Public Act 84-332; Public Act 84-342; and, C.G.S. Sec. 30-63a(b), thereby establishing how we shall enforce, and expect compliance with, these interrelated sections.

a. Under the changes effected by Sec. 3 of Public Act 332, which amends C.G.S. Sec. 30-63(b), the brewer must now affirm that, *at the time of the posting* (and only at the time of the posting), the price *is* no higher than the lowest price in a surrounding state. Under the old law, at the time of posting, the brewer had to affirm that the price *would be* no higher than the lowest price in any state bordering this state at any time during the calendar month covered by such posting.

b. While C.G.S. Sec. 30-63a(b) of the Connecticut General Statutes was not amended, we must interpret such section in light of the obvious intention of the Connecticut General Assembly as expressed by Senator Dorr at pp. 1277-78 of the Senate Proceedings for April 18, 1984. Accordingly, we determine and declare that C.G.S. Sec. 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section. (See paragraph 36, complaint).

c. Consistent therewith Sec. 3(e) of Public Act 84-332 creates C.G.S. Sec. 30-63b(e) which permits an out-of-state shipper to change prices in any border state during the calendar month covered by the posting. To the extent, and only to the extent, that C.G.S. Sec. 30-63a(b) is inconsistent with the intention of the legislature and conflicts with new C.G.S. Sec. 30-63b(e), it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the

new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price. (See paragraph 37, complaint).

d. Pursuant to Sec. 2-30b, Connecticut General Statutes, we must, and do, read Public Acts 82-332 and 82-342 harmoniously so that the "lowest price" in the border states is to be determined at the time of the posting and *not* during the period covered by the posting. (See paragraph 39, complaint).

Dated at Hartford, Connecticut, this 30th day of August, 1984.

/s/ John F. Healy
John F. Healy

/s/ David L. Snyder
David L. Snyder

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[Certificate of Service omitted in printing]

DECLARATORY RULING

Please be advised that the attached affidavit, filed in the United States District Court for the District of Connecticuut in U.S. Brewer's Ass'n v. Healy, No. H84 816 PCD, constitutes our Declaratory Ruling concerning the Beer Price Affirmation Provisions of the Connecticut Liquor Control Act, pursuant to C.G.S. Sec. 4-176.

/s/ John F. Healy

JOHN F. HEALY, CHAIRMAN

/s/ David L. Snyder

DAVID L. SNYDER, COMMISSIONER

Substitute Senate Bill No. 351

PUBLIC ACT NO. 84-332

AN ACT CONCERNING AFFIRMATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (c) of section 30-63 of the general statutes is repealed and the following is substituted in lieu thereof:

(c) Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, ON A MONTHLY BASIS, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend his posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size: provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth

prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met.

Sec. 2. Section 30-63a of the general statutes is amended by adding subsection (c) as follows:

(NEW) (c) No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale, to a wholesaler permittee any brand of wine as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia or to any state, including an agency of such state, which owns and operates retail liquor outlets.

Sec. 3. Section 30-63b of the general statutes is repealed and the following is substituted in lieu thereof:

(a) At the time of posting of the bottle, can and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of such alcohol and spirits posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of alcoholic liquor is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets, [, at any time during the calendar month covered by such posting.]

(b) At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. [, at any time during the calendar month covered by such posting.]

(c) AT THE TIME OF POSTING OF THE BOTTLE, CAN AND CASE PRICE REQUIRED BY SECTION 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, EVERY HOLDER OF A MANUFACTURER OR OUT-OF-STATE SHIPPER'S PERMIT, OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER, SHALL FILE WITH THE DEPARTMENT OF LIQUOR CONTROL A WRITTEN AFFIRMATION UNDER OATH BY THE MANUFACTURER OR OUT-OF-STATE SHIPPER OF EACH BRAND OF WINE POSTED CERTIFYING THAT AT THE TIME OF POSTING THE BOTTLE, CAN OR CASE PRICE TO THE WHOLESALER PERMITTEES IS NO HIGHER THAN THE LOWEST PRICE AT WHICH EACH SUCH ITEM OF WINE IS SOLD, OFFERED FOR SALE, SHIPPED, TRANSPORTED OR DELIVERED BY SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS.

[(c)] (d) By and with the consent of the department a manufacturer or out-of-state shipper may file with the department the affirmation required by this section once and may certify thereon that such affirmation shall remain in full force and effect until rescinded by said manufacturer or out-of-state shipper; such rescission to be effective at the beginning of a new posting period required by section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, and such notice of rescission shall be given at least fifteen days before its effective date. In the event of the rescission of an affirmation such manufacturer or out-of-state shipper shall not ship, transport, deliver, sell or offer to sell to a wholesaler permittee until a new affirmation is filed with said department in accordance with the provisions of this section.

(e) THIS SECTION SHALL NOT PROHIBIT A MANUFACTURER OR OUT-OF-STATE SHIPPER PERMITTEE OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER FROM CHANGING PRICES TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS AT ANY TIME DURING THE CALENDAR MONTH COVERED BY SUCH POSTING.

Sec. 4. Section 30-63c of the general statutes is repealed and the following is substituted in lieu thereof:

(a) In determining the lowest price for which any item of such alcohol and spirits is or was sold, offered for sale, shipped, transported or delivered [during such posted period] AT THE TIME OF POSTING by any manufacturer or out-of-state shipper to a wholesaler in any other state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any

such wholesaler in another state or in the District of Columbia or to any state or state agency which owns and operates retail liquor outlets; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible.

(b) In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered [during such posted period] AT THE TIME OF POSTING by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for differences in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits or each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

(c) IN DETERMINING THE LOWEST PRICE FOR WHICH ANY ITEM OF WINE IS OR WAS SOLD, OFFERED FOR SALE, SHIPPED, TRANSPORTED OR DELIVERED AT THE TIME OF POSTING, BY ANY MANUFACTURER OR OUT-OF-STATE SHIPPER TO A WHOLESALER IN ANY OTHER STATE OR IN THE DISTRICT OF COLUMBIA OR TO ANY STATE OR STATE AGENCY WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS, APPROPRIATE REDUCTIONS

WILL BE MADE FOR ALL DISCOUNTS, REBATES, FREE GOODS, ALLOWANCES AND OTHER INDUCEMENTS OF ANY KIND WHATSOEVER, INCLUDING DEPLETION AND FLOOR-STOCK ALLOWANCES, OFFERED OR GIVEN TO ANY SUCH WHOLESALER IN ANOTHER STATE OR IN THE DISTRICT OF COLUMBIA OR TO ANY STATE OR STATE AGENCY WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS, PROVIDED DIFFERENTIALS IN PRICE WHICH MAKE ONLY DUE ALLOWANCE FOR DIFFERENCES IN STATE TAXES AND FEES AND FOR THE ACTUAL COST OF DELIVERY ARE PERMISSIBLE.

Substitute Senate Bill No. 429

PUBLIC ACT NO. 84-432

AN ACT CONCERNING PRICES AND APPOINTMENT OF DISTRIBUTORSHIPS FOR BEER WHOLESALERS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. Subsection (b) of section 30-63c of the general statutes is repealed and the following is substituted in lieu thereof:

(b) In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer of out-of-state shipper to a wholesaler in any state bordering this state, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in state taxes and fees and for the actual cost of delivery are permissible. As used in this section, the term "ACTUAL COST OF DELIVERY" SHALL MEAN

THOSE EXPENSES INCURRED BY SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER IN DELIVERING THE ITEM OF BEER TO THE WHOLESALER FROM THE POINT OF ORIGIN TO THE POINT OF DESTINATION, THE TERM "POINT OF ORIGIN" SHALL MEAN THE LOCATION WHICH HAS BEEN ESTABLISHED THROUGH COURSE OF DEALING AS THE GEOGRAPHIC LOCATION FROM WHICH THE WHOLESALER HAS BEEN CHARGED BY THE MANUFACTURER OR OUT-OF-STATE SHIPPER FOR COSTS OF TRANSPORTATION, NOTWITHSTANDING THE FACT THAT THE ITEM OF BEER MAY HAVE BEEN MANUFACTURED OR BOTTLED AT, OR SHIPPED FROM, A DIFFERENT GEOGRAPHIC LOCATION, THE TERM "POINT OF DESTINATION" SHALL MEAN THE LOCATION WHICH HAS BEEN ESTABLISHED THROUGH COURSE OF DEALING AS THE GEOGRAPHIC LOCATION AT WHICH THE WHOLESALER TAKES DELIVERY OF THE ITEM OF BEER, THE TERM "state taxes and fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon or liter of such alcohol and spirits of each barrel, or fractional unit thereof, of beer and the term "gallon" shall mean one hundred twenty-eight fluid ounces and the term "liter" shall mean one thousand milliliters and the term "barrel" means not less than twenty-eight nor more than thirty-one gallons. A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes AND PACKAGES, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state.

Sec. 2. Subsection (a) of section 30-17 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) (1) A wholesaler permit shall allow the bottling of alcoholic liquor and the wholesale sale of alcoholic liquor to permittees in this state and without the state, as may be permitted by law, and the sale of alcoholic liquors to vessels

engaged in coastwise or foreign commerce, and the sale of alcohol and alcoholic liquor for industrial purposes to nonpermittees, such sales to be made in accordance with the regulations prescribed by the department of liquor control, and the sale of alcohol and alcoholic liquor for medicinal purposes to hospitals and charitable institutions and to religious organizations for sacramental purposes and the receipt from out-of-state shippers of multiple packages of still wines and sparkling wines. The holder of a wholesaler permit may apply for and shall thereupon receive an out-of-state shipper's permit for direct importation from abroad of alcoholic liquors manufactured outside the United States and an out-of-state shipper's permit for direct importation from abroad of beer manufactured outside the United States.

(2) When a holder of a wholesale permit has had the distributorship of any alcohol, beer, spirits or wine product of a manufacturer or out-of-state shipper or their successors or assigns for six months or more, such distributorship may be terminated or its geographic territory diminished upon (A) the execution of a written stipulation by the wholesaler and manufacturer or out-of-state shipper or their successors or assigns agreeing to the change and the approval of such change by the department of liquor control; or (B) the sending of a written notice by registered mail, return receipt requested, by the manufacturer or out-of-state shipper or their successors or assigns to the wholesaler, a copy of which notice has been sent simultaneously by registered mail, return receipt requested, to the department of liquor control. No such termination or diminishment shall become effective except for just and sufficient cause, provided such cause shall be set forth in such notice and the department of liquor control shall determine, after hearing, that just and sufficient cause exists. If an emergency occurs, caused by the wholesaler, prior to such hearing, which threatens the manufacturer's or out-of-state shipper's or their successor's or assign's products or otherwise endangers the business of the manufacturer or out-of-state shipper or their successors or assigns and said emergency is established to the satisfaction of the department of

liquor control, the department may temporarily suspend such wholesaler permit or take whatever reasonable action the department deems advisable to provide for such emergency and the department may continue such temporary action until its decision after a full hearing. The department of liquor control shall render its decision with reasonable promptness following such hearing. Notwithstanding the aforesaid, a manufacturer or out-of-state shipper or their successors or assigns may appoint one or more additional wholesalers as the distributor for an alcohol, [beer,] spirits or wine product within such territory, provided [with regard to alcohol, spirits or wine products] such appointment shall not be effective until six months [, and with regard to beer products one year,] from the date such manufacturer or out-of-state shipper or their successors or assigns shall set forth such intention in written notice to the existing wholesaler by registered mail, return receipt requested, with a copy of such notice simultaneously sent by registered mail, return receipt requested, to the department of liquor control. FOR JUST AND SUFFICIENT CAUSE, A MANUFACTURER OR OUT-OF-STATE SHIPPER OR THEIR SUCCESSORS OR ASSIGNS MAY APPOINT ONE OR MORE ADDITIONAL WHOLESALERS AS THE DISTRIBUTOR FOR A BEER PRODUCT WITHIN SUCH TERRITORY PROVIDED SUCH MANUFACTURER OR OUT-OF-STATE SHIPPER OR THEIR SUCCESSORS OR ASSIGNS SHALL SET FORTH SUCH INTENTION AND CAUSE IN WRITTEN NOTICE TO THE EXISTING WHOLESALER BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, WITH A COPY OF SUCH NOTICE SIMULTANEOUSLY SENT BY REGISTERED MAIL, RETURN RECEIPT REQUESTED, TO THE DEPARTMENT OF LIQUOR CONTROL. For the purposes of this section, just and sufficient cause means the existence of circumstances which, in the opinion of a reasonable person considering all of the equities of both the wholesaler and the manufacturer or out-of-state shipper or their successors or assigns, warrants a termination or a diminishment of a distributorship as the case may be.

(3) Nothing contained herein shall be construed to interfere with the authority of the department of liquor control to retain or adopt reasonable regulations concerning the termination or diminishing of a distributorship held by a wholesaler for less than six months.

(4) ALL HEARINGS HELD HEREUNDER SHALL BE HELD IN ACCORDANCE WITH THE PROVISIONS OF CHAPTER 54.

Sec. 3. This act shall take effect from its passage.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Rule 9(c), the Defendants hereby annex to their Motion for Summary Judgment the following statement of material facts as to which, they contend, there is no genuine issue to be tried:

1. The Plaintiff, U.S. Brewers Ass'n, Inc., is an association of companies that brew beer in the United States or that import beer for sale in the United States. Complaint, par. 8.

2. The Plaintiff companies are brewers or importers of beer that do business in Connecticut and are licensed as out-of-state shippers by the Connecticut Department of Liquor Control. Complaint, pars. 9–19.

3. The Defendants, John F. Healy and David L. Snyder, are Commissioners of the Connecticut Department of Liquor Control and are charged with the responsibility of enforcing the provisions of the Connecticut Liquor Control Act, C.G.S. Secs. 30-1 et seq. Complaint, pars. 21–22.

4. The Defendant, Charles W. Kasmer, is Secretary of the Connecticut Department of Liquor Control and he administers many of the day to day affairs of the Department. Complaint, par. 23.

5. The beer price affirmation provisions of the Liquor Control Act, C.G.S. Secs. 30-63a(b), 30-63b(b) and 30-63c(b), were enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. Complaint, par. 29.

6. The beer price affirmation provisions were upheld in *U.S. Brewers Ass'n. Inc. v. Healy*, 532 F.Supp. 1312 (D. Conn., 1982) but, on appeal, were found to be unconstitutional in *U.S. Brewers Ass'n. Inc. v. Healy*, 692 F.2d 275 (2nd Cir., 1982), aff'd with no opinion, ____ U.S. ____, 104 S.Ct. 265, 78 L.Ed.2d 248 (1983). (Copies of decisions attached); Complaint, par. 29.

7. In 1984, the Connecticut General Assembly amended the beer price affirmation provisions in Public Act 84-332 and Public Act. 84-432. Complaint, Exhibits A, B.

8. The declared purpose of Public Act 84-332 was to conform the beer price affirmation provisions to the Court's final decision in *U.S. Brewers Ass'n v. Healy*, supra. Complaint, par. 2; Transcript of legislative debate attached in Exhibit A.

9. The Commissioners of the Department of Liquor Control, by affidavit filed this date, and therein by Declaratory Ruling issued pursuant to C.G.S. Sec. 4-176, interpret the beer price affirmation provisions to conform with the final decision in *U.S. Brewers Ass'n v. Healy*, supra.

10. Public Acts 84-332, 84-432 and C.G.S. Sec. 30-63a(b) were enacted pursuant to the Twenty-first Amendment to the U.S. Constitution.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

By /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

By /s/ Robert F. Vacchelli/gmb
Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

By /s/ R. Langer /s/ LFM
Robert M. Langer
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
Tel: 566-5374

[Certificate of Service omitted in printing]

EXHIBIT A

[Certificate omitted in printing]

Substitute Senate Bill No. 351

PUBLIC ACT NO. 84-332

AN ACT CONCERNING AFFIRMATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER.

[Text of Bill omitted in printing]

1984 GENERAL ASSEMBLY

HOUSE OF REPRESENTATIVES

THURSDAY
MAY 3, 1984

* * *

CLERK:

Calendar 619, File No. 268, *Substitute for Senate Bill No. 351*, AN ACT CONCERNING APPLICATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER. Favorable Report of the Committee on General Law.

REP. MOSLEY: (72nd)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Maurice Mosley.

REP. MOSLEY: (72nd)

I move acceptance of the Joint Committee's Favorable Report and passage of the bill, Mr. Speaker.

SPEAKER STOLBERG:

Will you remark?

REP. MOSLEY: (72nd)

Mr. Speaker, briefly, Connecticut currently has affirmation on spirits, alcohol and beer and not wine. This bill would essentially do two things. It would include wine in the overall affirmation scheme, and also it will address a federal court's decision and it would specifically allow out-of-state shipper permittees to change their prices and any other state during calendar months covered by Connecticut posting to address the court's decision.

I move passage of the bill, Mr. Speaker.

SPEAKER STOLBERG:

Will you remark further on the bill? Will you remark further? Rep. Mordasky.

REP. MORDASKY: (52nd)

Mr. Speaker, the Clerk has LCO 3352. Would the Clerk please call and I ask permission to summarize.

SPEAKER STOLBERG:

The Clerk has an amendment, LCO 3352, House Amendment Schedule "A". Will the Clerk please call.

CLERK:

LCO No. 3352 designated *House Amendment Schedule "A"*, offered by Reps. Mordasky and Mushinsky.

SPEAKER STOLBERG:

Is there objection to summarization? Seeing none, please proceed.

REP. MORDASKY: (52nd)

Thank you, Mr. Speaker. Very briefly, Mr. Speaker, this amendment puts forth the provisions that the savings be passed on to the retailers and hopefully this way to the consumer.

I move its adoption.

SPEAKER STOLBERG:

Will you remark on House "A"? Will you remark on House "A"?

REP. MOSLEY: (72nd)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Just very briefly in opposition to the amendment, Mr. Speaker. The amendment is not practical, not enforceable, and not needed. Presently in checking with the Liquor Control Commission on the affirmation of alcohol spirits and beer, the savings are being passed on. We have gotten lower prices, so the amendment is not needed. Additionally, in terms of the different brands of wine that are being sold in computing the gross profit, it will be extremely difficult. And also checking with the Liquor Control Commission it will be a cost to the State of approximately $75, $76 per year if the amendment passes.

So I'd like to speak in opposition to the amendment, and I also would like a roll call vote on the amendment, Mr. Speaker.

SPEAKER STOLBERG:

The request is for a roll call vote. All those in favor of a roll call vote, please indicate by saying aye.

REPRESENTATIVES:

Aye.

SPEAKER STOLBERG:

Adequate number is arrived at. When the vote is taken it will be taken by roll.

REP. MORDASKY: (52nd)

Mr. Speaker.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Mordasky.

REP. MORDASKY: (52nd)

A question to Rep. Mosley, please.

SPEAKER STOLBERG:

Please frame your question, sir.

REP. MORDASKY: (52nd)

Thank you, sir. Through you, sir, I also got that fiscal note from OLR, and maybe I can't figure it out. I didn't do so good last night, but on lines 4, 5, and 6 and 7, on the file copy which says there's no fiscal impact, it says each manufacturer, wholesaler, and out of state shipper permittees shall post with the department on a monthly basis, etc.

On my bill, on line, in the amendment on line 35 it says "at time of posting of the bottle" etc. What difference does it make?

SPEAKER STOLBERG:

Rep. Mosley, do you care to respond?

REP. MOSLEY: (72nd)

I believe in the amendment they have a number 6 which is [illegible] the gross mark up, and I believe that would have to be [illegible]mined. The wholesaler doesn't have to hire

somebody to determine that, and in order to check that according to the fiscal note, I believe the Liquor Control Commission will need two additional accountants and probably a clerk to adequately monitor and check those procedures.

REP. MORDASKY: (52nd)

Mr. Speaker, through you to Rep. Mosley, another question, please.

SPEAKER STOLBERG:

Please frame your question.

REP. MORDASKY: (52nd)

Rep. Mosley, through you, sir, do you mean to tell me they're not going to check on the monthly basis at all? They're not going to send anybody out there?

SPEAKER STOLBERG:

Rep. Mosley, do you care to respond?

REP. MOSLEY: (72nd)

Mr. Speaker, through you, I really don't understand the question. Perhaps he could restate it. I don't understand the question, sir.

SPEAKER STOLBERG:

Rep. Mordasky, could you restate the question.

REP MORDASKY: (52nd)

Mr. Speaker, on the file copy, through you, sir, it says on a monthly basis the bottle, can and etc. case price is going to be posted. Are they not going to send a man out to check that on a monthly basis?

REP. MOSLEY: (72nd)

Through you, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Mr. Speaker, I believe they would have to. However, under this amendment you would need additional people power in the Liquor Control Commission to adequately supervise and monitor and implement this amendment.

REP. MORDASKY: (52nd)

Mr. Speaker, through you.

SPEAKER STOLBERG:

Rep. Mordasky.

REP. MORDASKY: (52nd)

This is the question. It seems that if they send the same man out to look at the monthly listing of the prices, why can't he check it all at once?

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Through you, just briefly, it's my understanding that a man is not sent out but prices are sent to a Liquor Control Commission, and most of the checkin, is done in-house, and under this bill in terms of checking for gross profits, you're

going to need additional individuals, additional accountants to check.

REP. MORDASKY: (52nd)

Through you, Mr. Speaker, another question, please.

SPEAKER STOLBERG:

Please frame your question.

REP. MORDASKY: (52nd)

Thank you, Mr. Speaker. Through you, why can't they send the whole business into the liquor commission and let the liquor commission check it out?

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Through you, Mr. Speaker. You have to have additional accountants checking the material, checking the work that's being sent in, and according to the fiscal note, that's approximately $76,000 for the entire fiscal year.

REP. MORDASKY: (52nd)

Mr. Speaker, I had a little confusion when I read this file copy and found that there was no extra cost, and I called the Office of Fiscal Analysis about the money that they charge me on the amendment, and it says, and this is what they sent back.

While the amendment does not specifically require the Department of Liquor Control to perform additional duties, and thus can be construed to have no fiscal impact, the

department has indicated that the need for staff to do compliance audit of the wholesalers. I don't understand it. They audit the wholesalers now, don't they? Through you, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mosley, do you care to respond?

REP. MOSLEY: (72nd)

Through you, Mr. Speaker. I think I adequately answered your question. Through you.

SPEAKER STOLBERG:

Rep. Mordasky, you have the floor.

REP. MORDASKY: (52nd)

That's all. Thank you very much, sir.

SPEAKER STOLBERG:

Will you remark further on the bill? Will you remark further? Rep. John Woodcock.

REP. WOODCOCK: (14th)

Mr. Speaker, members of the House, the question before us with this amendment and mostly with this bill, who do we believe? In 1981 we deliberated on an affirmation bill which was one of the most heavily lobbied bills in that session.

In 1984 the same situation exists. The '81 statute was ultimately struck down by the Supreme Court of the United States as being unconstitutional, as being price-fixing, as being a restraint on trade, and as being one that interfered with the commerce clause. At the same time, the 1981 House

and General Assembly received information from the wholesalers here in our state that affirmation would save our consumers money.

There is no evidence or no proof that I have seen yet that affirmation saved money. In fact, the work that has been done by the Office of Legislative Research has indicated that prices went up after affirmation went on the books. Also, when affirmation was struck down, prices stabilized. They did not go up as one would expect if indeed affirmation was holding prices down for the general public. I think what we have to do here is we've got to decide who we want to represent. Do we want to represent the people that make wine, the people that make beer, the people who sell beer on a wholesale basis in this state? Because what the special interests are asking us to do today is cut the pie so they can share it in the way that they wish to share it.

This is one of the most heavily lobbied bills that the House has seen this entire session. I would not even want to estimate what the payroll has been for lobbyists on this, and I must commend the lobbyists for the job that they have done. They have presented their case in a very coherent and sometimes plausible fashion.

One does not know which to believe. But I think if we're truly going to be paying attention to the public's best interests then we should leave the marketplace alone and let the marketplace dictate what prices will be. And if we're really looking after the public, then we should pass this consumer bill advocated this afternoon by Rep. Mushinsky and Rep. Mordasky. The question is are we really in favor of a consumer pass-through? We have no evidence whatsoever that affirmation has saved any consumers any money. We have plenty of evidence to the opposite that the special interests want this bill very much. Please support the amendment.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Mushinsky.

REP. MUSHINSKY: (85th)

I'm not convinced that the bill itself will lower prices. Beer is a different animal than the more commonly affirmed hard liquor. It's true that hard liquor affirmation has lowered prices. You can see that if you check the figures. But if you ask OLR for figures on beer affirmation the short time we had it, OLR concluded it did not appear to have a great effect on prices to Connecticut wholesalers.

Three of the major brands went up. Four of the major brands went down, and two had no change. I asked them what could we do to this bill to get the possible savings down to the consumers, and they said you really would have to price fix all the way down to the consumer's level, but that would be impossible to regulate. You would have so many staff required. This amendment doesn't go all the way to the bottom, but it's as far as we can go at a low cost. It's as close as we can get to the consumer, bringing it down to the 5,000 number of retailers and we urge your adoption of the amendment. If this amendment fails, we urge your rejection of the bill.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Walkovich. Rep. Scully was first, and then Rep. Walkovich.

REP. SCULLY: (75th)

Mr. Speaker, I rise in opposition to the amendment. The people who fought this bill all along were both the wholesalers and the people who manufacture these products. Now, if they were against it, there must be something good about it. We

also have to remember that beer pricing has a great deal of flux through New England because of the question of the bottle bill.

The bottle bill was passed early in this state, but the other states have just been following, so the beer prices have really been in flux. You can't make some very fair comparisons on the beer prices. Last but not least, just three years ago we did away with minimum mark up in this state. Many of you here voted for doing away with minimum mark up again, something that the people didn't want, which we didn't want, which we supported doing away with. To support this amendment I think is the wrong thing to do at this time.

SPEAKER STOLBERG:

Will you remark further?

REP. BENVENUTO: (151st)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Benvenuto.

REP. BENVENUTO: (151st)

I'd like to excuse myself for a possible conflict of interest.

SPEAKER STOLBERG:

The Journal will so note, sir. Rep. Walkovich.

REP. WALKOVICH: (109th)

Mr. Speaker, a question through you to the proponent of the amendment.

SPEAKER STOLBERG:

Please frame your question.

REP. WALKOVICH: (109th)

Rep. Mordasky, is there any cap on the amount of increase which a retailer can charge after he has received the product from the wholesaler?

SPEAKER STOLBERG:

Rep. Mordasky.

REP. MORDASKY: (52nd)

Through you, sir, there is no cap. And we hope that the 5,000 retailers would be in enough competition with each other to bring a lower price to the consumer. You know, it's a combination of 19 wholesalers and 5,000 retailers.

REP. WALKOVICH: (109th)

Mr. Speaker, speaking in opposition to the amendment, I think Rep. Mordasky has just proven that this is a false pass-through. We're saying that shifting a cap on the amount of increase that the wholesaler could charge to the retailer, and yet the retailer can charge whatever he pleases. If the cap is good for the wholesaler, it should be good for the retailer.

If the open market competition is good for the retailer, it should be good for the wholesaler. Mr. Speaker, this is a false amendment. It's an attempt to kill the bill. This amendment couldn't even get a sponsor in the Senate. Therefore, I would move opposition to the amendment.

SPEAKER STOLBERG:

Will you remark further on the amendment?

REP. MOYNIHAN: (10th)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Moynihan: (10th)

Mr. Speaker, I rise to speak in opposition to the amendment. I think it's interesting that the amendment is being fostered upon this body by the group that really has been lobbying most of the session and going back three years to kill the whole issue of affirmation.

It really has nothing to do with pass-through. If that was the case, then they would have been in favor of affirmation over the last three years with an affirmation amendment. Instead, they want the courts to strike our affirmation law. Let me give you a little history about how we got to this perspective to start off with.

For several years we fought the issue of repeal of minimum mark up, going to a free market. When the compromise finally came up three years ago and we decided to open up competition among our retailers and among our wholesalers so they were no longer protected by minimum mark up. What we are concerned is the leverage of the State stores had in purchasing and the border states, the very large states, and the enormous size of their wholesalers and retailers, that our wholesalers and retailers would be at a disadvantage because so many of our consumers had gotten in the habit of going across the border.

At that time, as part of the compromise, for those of you who were here, the bill sat on the Senate Calendar for six weeks. If you think this issue was lobbied, you should have been here then. And the tugging and pulling that went back and forth, and as part of the final agreement, beer affirmation was put in. We've always had liquor affirmation, and

wine affirmation was given a moratorium. I think the moratorium has passed, and I think it's appropriate. Let us find out. Let us open the market to see that prices are realistically offered in Connecticut as they are in adjacent states, and let us see.

And if we find out that it is the case where there are not savings that come to the consumer, then I think we ought to address it. But we should not go back to trying to price fix margins in terms of relationships on individual purchases as this amendment tries to do. Bearing in mind that this amendment is being brought to you by those that have opposed affirmation for the entire session. We did get into it before we went to repeal the minimum mark up. We did get into an issue of when distillers and vintners primarily go for post-offs on pricing, that that was able to be passed through on a monthly basis to retailers. We tracked that very carefully in the late 70's, and we found out the evidence is clearly there that those post-offs and reductions in prices were passed from the wholesalers to the retailers and ultimately to the consumers.

And those were the specials that you began to see offered in the late 70's in our package stores before we went the full route of repeal. I think the bill is proper. I think the amendment before us does not come well-grounded in good intentions. And as I say, if it was, this is the issue that you would have seen discussed in committee and in the process for the last several months. It would have been the issue of this amendment, but instead it was the issue of let's kill affirmation. That's why it's here today. I urge defeat of the amendment.

SPEAKER STOLBERG:

Will you remark further on the amendment? Will you remark further? Rep. Fusscas.

REP. FUSSCAS: (55th)

Thank you, Mr. Speaker. I have some questions about the amendment. I'm confused. And through you, if I may, to Rep. Mordasky, could you tell me, sir, what this would cost to implement at the wholesale basis, one wholesaler?

SPEAKER STOLBERG:

Rep. Mordasky.

REP. MORDASKY: (52nd)

Through you, Mr. Speaker, I don't have any idea, but the 19 wholesalers make $420 million. They ought to be able to hire a secretary to take care of it.

REP. FUSSCAS: (55th)

Thank you, Rep. Mordasky. Another question, it's new, section d. And in reference to wine, is it my understanding that if you had a gross mark up of let's say 50¢ per bottle of wine, which is the average gross mark up through the past 340 days, if that wine was to go up in cost to the wholesaler, he could not charge more than that 50¢ average gross up?

REP. MORDASKY: (52nd)

Through you, Mr. Speaker, I don't believe he could. It would be the average.

REP. FUSSCAS: (55th)

If I may, through you, Mr. Speaker, pose one more question.

SPEAKER STOLBERG:

Rep. Fusscas.

REP. FUSSCAS: (55th)

Wine in a bad year sells at a discount. Suppose we had a very good year and it was selling at a premium, and let's say that it doubled and tripled in cost. Are you saying then that a bottle of wine the wholesaler bought for $5 that he's now buying for $15, he's getting the same small percentage?

REP. MORDASKY: (52nd)

It is a percentage, through you, sir, it would be a percentage and therefore as percentage would follow through. A percentage of the previous 12 months.

REP. FUSSCAS: (55th)

One more question, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Fusscas.

REP. FUSSCAS: (55th)

If his average gross mark up in a percentage was 10% of the $15 as well as the $5. Is that correct?

REP. MORDASKY: (52nd)

It would be the percentage of the profit that he would make, yes.

REP. FUSSCAS: (55th)

I have no other questions.

SPEAKER STOLBERG:

Will you remark further on the amendment?

REP. VAN NORSTRAND: (141st)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Van Norstrand.

REP. VAN NORSTRAND: (141st)

I don't know that I wish to inquire of the proponent as perhaps Rep. Mosley. There was just debate a moment ago which I think I understand as I read this. The last part of well, really, lines 29 through 32, as I read the amendment, it says if you introduce a new product unlike the part from lines 23 through 29, or 28, if you, which says each item. If you introduce a new product, your mark up is tied, on line 31½ to the permittee's average gross mark up on all items sold by such permittee during such period. Through you, Mr. Speaker, to Rep. Mosley, as I understand it, profits will vary from wine to beer, historically, indeed even when there was minimum mark up, the fixed mark ups were quite different, and I suspect in a semi-free market are to this day. If you had to introduce a new item and say it was a wine and it was historically marked up considerably more than say beer was, would you not be in trouble under the second part of this new subsection d in that the beer, the historic 12-month average of all the beer items you were selling would pull down any permissible mark up perhaps to a price which makes it unworkable?

REP. MOSLEY: (72nd)

Through you, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

That's correct, Mr. Speaker.

REP. VAN NORSTRAND: (141st)

People can feel whatever they want to about whatever they want to do as consumers, but I think they can't deal with this amendment. It is seriously flawed in that regard because the second part says "all items" and that average could be very low.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Miscikoski.

REP. MISCIKOSKI: (65th)

Thank you, Mr. Speaker. Mr. Speaker and members of this House, you know it's always fascinating. Every time there's a bill that comes up involves drinking, you know, the State rips everybody off now. There's nobody that pays these licenses. You've heard the story before. Now we're discussing their profits. We never discuss the profits the lawyers make, the doctors make, the dentists, or anybody else. The auto industry that keeps ripping us off, that's why their profits are great.

That's why you have to pay for the price of the car the way it is. We don't debate that here. We're always picking on one industry. I only regret that 22 years ago I didn't start screaming like I been screaming lately, because the people in the liquor industry, they're constantly being criticized one way or another and constantly being ripped off by government. Every time they want taxes, they go up and bag them.

You know, what's the difference how much money they make? They're in business to make money. They create jobs.

It's like I said, my father always said that I hope the Torrington company makes a lot of money. Then he says, I'll always have a job. You know, it's getting tougher and tougher and tougher to do business in this state. We're constantly bagging the people that create jobs.

If it isn't taxes, it's some stupid law, and boy, do we pass a lot of stupid laws here, and the public out there is sick and tired of the garbage that we do here. If you don't believe me, go out there and ask them in the street. I used to live with the public when I ran a restaurant. You know, it's about time. Let's go after some other people. Why pick on the same industry over and over, I don't give a damn what it is?

It's the only industry that they pick on, and I'm only sorry that I didn't start this campaign to start working in their behalf 22 years ago. Because most of the people who are involved in this business are constantly working hard and they have to take all the crap that we give them from government. Thank you.

SPEAKER STOLBERG:

Will you remark further on the amendment? Oh, I'm sorry, I thought that was the concluding remark we just had. Rep. Prague.

REP. PRAGUE: (8th)

I just have a question, Mr. Speaker. Far be it from me to push the liquor industry, but business is business, and I would like to ask through you, Mr. Speaker, a question of Rep. Mordasky.

SPEAKER STOLBERG:

Please frame your question, madame.

REP. PRAGUE: (8th)

Rep. Mordasky, if a wholesaler is tied, you know, to a price of beer that was sold to him by the brewery for a whole year, what happens if in his business the cost of his electricity goes up or his telephone goes up or the variables that exist in any business? Is he as a businessman entitled, you know, to increase his charges depending on his costs?

REP. MORDASKY: (52nd)

Through you, Mr. Speaker.

SPEAKER STOLBERG:

Yes, sir.

REP. MORDASKY: (52nd)

Through you, Mr. Speaker, the lobbyist told me that there was any cost and increase in labor that the industry would have to eat it, and I don't think that's any different from the dairy industry. Axle weights are going to cost the price of hauling milk 8$ a hundred. It's going to cost my sons and I $2,000 a year. We got to eat it.

REP. PRAGUE: (8th)

Rep. Mordasky, through you, Mr. Speaker.

SPEAKER STOLBERG:

Rep. Prague.

REP. PRAGUE: (8th)

It's not fair. It's not fair, and I agree with you that the dairy industry, that's not fair.

SPEAKER STOLBERG:

Will all members please be seated. Will staff and guests.

REP. VAN NORSTRAND: (141st)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Van Norstrand.

REP. VAN NORSTRAND: (141st)

Just to put this in perspective, just so there's not another group for Rep. Miscikoski to defend, I think we all know the dairy industry's been milking us for a long time.

SPEAKER STOLBERG:

Will you remark further on the amendment? Rep. Zajac.

REP. ZAJAC: (83rd)

Yes, Mr. Speaker, and thank you. I think we've gone astray in our deliberations on this really. I think the bottom line you have to ask yourself and there seems to be some doubt in this Chamber whether affirmation in the past has worked. Some feel it has, some feel it hasn't.

I think Rep. Mushinsky in her own statistics she threw out on the floor said that in four cases it worked and in three not. Well, I'd point out that that's across the line of various brands, but I ask you to ask yourself, do you see constituents now shopping more so than ever in Connecticut than they used to, instead of going to Springfield to Town & Country or to Sturbridge Village or across the line in New York? Affirmation, I think you can look at your local papers and the ads within the paper.

And you have seen some real competitive prices, so much so that they're exactly the same price as up in Massachusetts now that they do have a bottle bill, and the fact that the sales tax and collection is different, the bottle prices are so close that people feel they don't have to travel to Massachusetts. It's not worth the extra gas. So affirmation, in fact, is working, has worked, but you have to dig down deeper to evaluate that with the bottle bill situation, sales tax, all the ***

CLERK:

House Amendment Schedule "A" to Senate Bill 351.

Total Number Voting	146
Necessary for Adoption	74
Those Voting Yea	21
Those Voting Nay	125
Those Absent and Not Voting	5

SPEAKER STOLBERG:

The amendment is defeated.

Will you remark further on the bill? If not, will members please be seated.

REP. MORDASKY: (52nd)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Mordasky.

REP. MORDASKY: (52nd)

On the bill, Mr. Speaker.

SPEAKER STOLBERG:

On the bill.

REP. MORDASKY: (52nd)

Rep. Moynihan talked about a free market. If there's a free market, affirmation doesn't come into a free market. Rep. Zajac said that things were very good now and we were in line with our competition without affirmation, so what do we need the bill for? We want a free market, we don't need affirmation. If things are good now, we don't need affirmation.

I'm against the bill. Vote it down.

SPEAKER STOLBERG:

Will you remark further? Rep. Woodcock.

REP. WOODCOCK: (14th)

Mr. Speaker, just a few things I'd like to share with the Chamber. Again I'd like to state that there is no hard evidence of any kind that affirmation has led to lower prices for the public. In fact, there's only one state that has beer affirmation, and that's the State of New Mexico, and no one was able to furnish me with any information indicating that affirmation had a positive effect with respect to the public's purchasing power.

So I think it's important that the record should reflect that. Also, the State of Connecticut has been put on notice at the public hearing that was held before the General Law Committee in this session that there will be another challenge to this statute. And I'd like to share with you some of the

comments of the Assistant Attorney General who spent two years defending our 1981 statute, which was ultimately struck down by our Supreme Court. Attorney General Richard Sheridan said that the affirmation statute was something that was hard to police. It would not lower prices to the public. It would only lower prices for wholesalers, and that the State of Connecticut had spent well over $150,000 in defending that particular statute.

I would suggest to you that you're going to see this case in court again, and I don't want to sound like a prophet, but I would not be a bit surprised if our statute is once again ruled unconstitutional. I urge the defeat of the bill.

SPEAKER STOLBERG:

Will all members please be seated. Will staff and guests come to the well of the House. Will you remark further on the bill? If not, the machine will be opened.

CLERK:

The House of Representatives is now voting by roll. Members please return to the Chamber immediately. The House of Representatives is currently voting by roll. Members please return to the Chamber immediately.

SPEAKER STOLBERG:

Have all the members voted? Have all the members voted? If all the members have voted, the machine will be locked, and the Clerk will take a tally.

Will the Clerk please announce the tally.

CLERK:

Senate Bill 351.

Total Number Voting	145
Necessary for Passage	76
Those Voting Yea	133
Those Voting Nay	12
Those Absent and Not Voting	6

SPEAKER STOLBERG:

The bill is passed.

* * *

THE CLERK:

Calendar 186, File 268, *Substitute for Senate bill 351*, AN ACT CONCERNING AFFIRMATION OF THE WHOLESALE PRICE OF SPIRITS, WINE AND BEER, Favorable Report of the Committee on General Law. The Clerk has an Amendment.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes Mr. President. I move adoption of the Joint Committee's Favorable Report and passage of the Bill.

THE CHAIR:

Clerk please call the Amendment.

THE CLERK:

Clerk has *Senate Amendment, Schedule A*, LCO 3307.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes Mr. President. That Amendment's been withdrawn.

THE CHAIR:

The Amendment is withdrawn. Any further Amendments?

THE CLERK:

No Mr. President.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes Mr. President. This measure, with respect to this measure, presently manufacturers and out of state shippers of alcohol and spirits are prohibited from selling their products to Connecticut wholesalers at prices which are higher than the lowest price charged for those products in any other state or the District of Columbia and must affirm that fact under oath. Similar affirmation is required of manufacturers and out of state shippers of beer who must charge Connecticut wholesalers the lowest price they charge in bordering states. The prices so affirmed Mr. President, prevail for the entire month after they are posted with the Department of Liquor Control.

This Bill, Mr. President, would alter existing price affirmation requirements and would include wine in the new price posting affirmation system. Prices on all alcoholic beverages sold in Connecticut would be posted on a monthly basis with the Division of Liquor Control but any affirmation as it reflects prices charged anywhere else in the country would apply only to the price existing at the time of posting and not

for the entire month after as is currently required, Mr. President.

This Bill would specifically allow manufacturers and shippers to change wholesale prices on all other states and the District of Columbia at any time during the calendar month covered by the Connecticut posting. Mr. President, if there is no objection to this measure, I would ask that it *be placed on the Consent Calendar.*

THE CHAIR:

Hearing none, *so ordered.*

• • •

THE CHAIR:

Is there any other correction, omission or request to change the Consent Calendar? If not, the machine is open. Senator Gunther. All Senators have voted. The machine is closed and locked.

The vote is 36 to 0. *The Consent Calendar is adopted.*

• • •

EXHIBIT B

(Certificate omitted in printing)

Substitute Senate Bill No. 429

PUBLIC ACT NO. 84-432

AN ACT CONCERNING PRICES AND APPOINTMENT OF DISTRIBUTORSHIP FOR BEER WHOLESALERS.

(Text of Bill omitted in printing)

WEDNESDAY
APRIL 4, 1984

• • •

SENATOR SCHNELLER:

The next two items, Cals. 167 and 168 will be Passed Retaining its Place. Cal. 169 will be taken up.

Page eight — Cal. 170 will be Passed Retaining its Place. 171 will be taken up. 172, *Substitute for Senate Bill No. 429*, I move that it be placed on the *Foot of the Calendar.*

THE CHAIR:

Without objection, so ordered.

SENATOR SCHNELLER:

The remaining two items on the page will be taken up.

Page nine — all items on the page will be taken up with the exception of Cal. 177 and that will be Passed Retaining its Place.

Page ten — 180 will be taken up. 181 will be Passed Retaining its Place. 182 will be taken up. 183 will be Passed Retaining its Place. The last two items will be taken up.

Page eleven — the first item will be Passed Retaining its Place, Cal. 186. All other items on the page will be taken up.

Page twelve — Cal. 192 will be Passed Retaining its Place. The next two items will be taken up. Cal. 195 and 196, the last two items will be Passed Retaining their Places.

Page thirteen — the first four items will be taken up.

Senate Agenda # 8, Monday, May 7, 1984:

BUSINESS FROM THE HOUSE
COMMITTEE ON CONFERENCE

Judiciary. H.B. 5078. AN ACT CONCERNING COMPETENCY TO STAND TRIAL. Committee on Conference Report to Reject House B and Adopt a New Amendment — House Amendment C. LCO 4152, Accepted 5/7.

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THE CHAIR:

Are we ready to proceed?

THE CLERK:

Yes, Mr. President. Page 32, under the heading Foot of the Calendar, a matter removed from the Foot, Cal. 172, File 223, *Substitute for Senate bill 429.* AN ACT INCREASING THE AMOUNT OF FINES ACCEPTED IN LIEU OF SUSPENSION OF A LIQUOR PERMIT. Favorable Report of the Committee on General Law. The Clerk has amendments.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes, Mr. President, I move adoption of the Joint Committee's favorable report and passage of the bill.

THE CHAIR:

The Clerk please call the first amendment.

THE CLERK:

The Clerk has *Senate Amendment Schedule A*. LCO 3317, offered by Senator Dorr.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes, Mr. President. That amendment has been Withdrawn.

THE CHAIR:

The amendment is withdrawn.

Call the next amendment.

THE CLERK:

The Clerk has *Senate Amendment Schedule B*. LCO 2850, offered by Senator Murphy.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes, Mr. President, I move adoption of the amendment and ask that the reading be waived.

THE CHAIR:

Without objection, you may proceed.

SENATOR DORR:

Yes, Mr. President. This amendment mandates, by statute, two practices that are the norm here in the State of Connecticut. First, it mandates the continuation of current and historic shipping patterns from breweries to distributors. Second, it requires that breweries prove just and sufficient cause before adding additional distributors in franchise areas. These two measures will prevent out-of-state shippers from bringing punitive measures against in-state distributors.

Mr. President, I move adoption of the amendment.

THE CHAIR:

Do you wish to remark further on the amendment. If not, all those in favor signify by saying Aye. Those opposed Nay. The Ayes have it. **SENATE AMENDMENT B IS ADOPTED.**

Further amendments?

THE CLERK:

Yes, Mr. President. The Clerk has *Senate Amendment Schedule C.* LCO 3923, offered by Senator Streeter.

THE CHAIR:

Senator Streeter.

SENATOR STREETER:

Mr. President, I would like to withdraw that amendment.

THE CHAIR:

Senate Amendment C is withdrawn.

THE CLERK:

No further amendments.

THE CHAIR:

Senator Dorr.

SENATOR DORR:

Yes, Mr. President. Senate Amendment Schedule B is the bill itself. I move adoption of the bill and ask that a roll call be taken.

THE CHAIR:

You are asking for a roll call?

SENATOR DORR:

Yes, this is so this measure can be transmitted to the House.

THE CHAIR:

Do I understand, Senator, that you are going to suspend the rules later for the transmittal of all of these bills, or do you want a separate roll call.

SENATOR SCHNELLER:

Mr. President, through you, a question to the Minority Leader, Senator Robertson. Senator Robertson, I am going to ask for suspension of the rules on this later, so we can put this on the Consent Calendar? (The answer was yes, in the background) Thank you.

THE CHAIR:

Without objection, *this item is placed on the Consent Calendar.*

SENATOR DORR:

Thank you, Mr. President.

THE CLERK:

Page thirty-three, Cal. 467, *Senate Bill No. 613*, File 673. AN ACT CONCERNING THE SALE OF THE WILLIMANTIC ARMORY. This was taken of removed from the Foot of the Calendar. Favorable report of the Committee on

Finance, Revenue and Bonding. The Clerk has an amendment, OFFERED by Senator Johnston.

SENATOR JOHNSTON:

Mr. President, I would move for acceptance of the Joint Committee's favorable report and passage of the bill.

THE CHAIR:

The Clerk please call the amendment.

THE CLERK:

The Clerk has *Senate Amendment Schedule A.* LCO 3398, offered by Senator Johnson.

THE CLERK:

An immediate roll call has been called for in the Senate. Will all senators please take their seats. An immediate roll call has been called for in the Senate. Will all senators please be seated.

THE CHAIR:

Please give your attention to the Clerk who will announce all of those items that have been referred to the Consent Calendar, and at the conclusion, we will take a vote on these items.

THE CLERK:

Page thirty-two, Cal. 172. Page thirty-three, Cal. 467. The Senate will stand at ease. Senator Schneller.

SENATOR SCHNELLER:

Mr. President, are we ready to vote on the Consent Calendar?

THE CHAIR:

Did we call all the items, Mr. Clerk?

THE CLERK:

I believe so, Mr. President.

THE CHAIR:

Are there any corrections or omissions? The machine is open. Please record your vote. Has everyone voted? The machine is closed. The Clerk please tally the vote.

RESULT OF THE VOTE: 36 Yea. 0 Nay. **THE CONSENT CALENDAR IS ADOPTED.**

Senator Schneller.

SENATOR SCHNELLER:

Mr. President, I move for suspension of the rules to send any items that are going down to the House for immediate transmittal to the House.

THE CHAIR:

Without objection, so ordered.

REP. GROPPO: (63rd)

Mr. Speaker, I ask for suspension of the rules so that we can call a non-starred item, on page 6, item 816, Calendar 816.

SPEAKER STOLBERG:

Is there objection to suspension of the rules? Is there objection? Seeing no objection the rules are suspended and the item is before us. Will the Clerk please call it.

CLERK:

Calendar page 6, Calendar No. 816, File No. 223, *Substitute for Senate Bill No. 429*, AN ACT INCREASING THE FINES ACCEPTED IN LIEU OF SUSPENSION OF A LIQUOR PERMIT. (As amended by Senate Amendment Schedule "B"). Favorable Report of the Committee on General Law.

REP. MOSLEY: (72nd)

Mr. Speaker.

SPEAKER STOLBERG:

Rep. Maurice Mosley.

REP. MOSLEY: (72nd)

I move acceptance of the Joint Committee's Favorable Report and passage of the bill, Mr. Speaker.

SPEAKER STOLBERG:

Will you remark?

REP. MOSLEY: (72nd)

Mr. Speaker, the Clerk has an amendment. Senate Amendment "B", LCO No. 2850. I'd like the Clerk to call and I have permission to summarize.

SPEAKER STOLBERG:

The Clerk has an amendment, LCO 2850, Senate Amendment Schedule "B". Will the Clerk please call.

CLERK:

LCO No. 2850, designated *Senate Amendment Schedule "B"*, offered by Senators Murphy and Robertson.

SPEAKER STOLBERG:

Is there objection to summarization? Seeing none, please proceed.

REP. MOSLEY: (72nd)

Mr. Speaker, briefly, this amendment was passed. The Senate unanimously was offered by the leadership in the Senate. Senators Murphy and Robertson. And essentially it does two things Mr. Speaker.

First, it mandates the continuation of current and historical shipping patterns from breweries to distributors.

And, secondly, it requires the breweries, when they are going to put another, add another distributor in the territory, they have to establish just and sufficient cause for doing so. And, I move adoption of the amendment, Mr.***

REP. FARR: (19th)

Mr. Speaker, I recognize the hour is late. Unfortunately we have legislation before us that has not been in our files. No one has had a chance to read or think about the impact. I'm trying to raise some issues here and it appears to me that we have an amendment before us that I don't believe we've fully heard at any point. I think it makes some substantial changes in our law and a question through you to Rep. Mosley, was the issue of requiring a showing of need in order to establish a new distributor ever a subject of a public hearing.

SPEAKER STOLBERG:

Rep. Mosley.

REP. MOSLEY: (72nd)

Through you, Mr. Speaker. The concept which we are talking about right now was discussed in the General Law Committee and was discussed as hearing on affirmation Mr. Speaker, through you.

SPEAKER STOLBERG:

Rep. Farr.

REP. FARR: (19th)

Mr. Speaker, I recognize this is probably going to pass because so many affirmation types of bills have passed this House.

I just point out to you it's another anti-consumer legislation that gives vested rights to certain people in our society and those are distributors. And what you're saying is that we're going to pass state statutes giving some gusted right in distributors that there can't be any competition and everybody can pay higher liquor fees.

And we're going to do that in the name, I guess, of fairness. I don't know who is being fair to whom here, but I think it's a bad amendment and it ought to be rejected.

SPEAKER STOLBERG:

Will you remark further on Sencte "B"? Will you remark further? If not, all those in favor of the amendment please indicate by saying aye.

REPRESENTATIVES:

Aye.

SPEAKER STOLBERG:

All those to the contrary nay.

REPRESENTATIVES:

No.

SPEAKER STOLBERG:

The ayes have it. *The amendment is adopted.*

Will you remark further? Rep. Mosley.

REP. MOSLEY: (72nd)

Mr. Speaker, just briefly on the bill, the bill will allow the Department of Liquor Control Commission, which has discretionary authority now, to accept money in lieu of suspensions. This would collify the statute the statute and will also increase the amount of fines that are accepted in lieu of suspension of liquor permits. I move passage of the bill, Mr. Speaker.

SPEAKER STOLBERG:

Will you remark further on the bill? Will you remark further? If not, will members please be seated. Will staff and guests come to the well of the House. The machine will be opened.

CLERK:

The House of Representatives is now voting by roll. Will the members please return to the Chamber immediately.

The House of Representatives is now voting by roll. Will the members please return to the Chamber immediately.

SPEAKER STOLBERG:

Have all the members voted? Have all the members voted and is your vote properly recorded?

Have all the members voted? Have all the members voted and is your vote properly recorded? If all the members have voted, the machine will be locked and the Clerk will take a tally.

Will the Clerk please announce the tally.

CLERK:

Senate Bill 429, as amended by Senate Amendment Schedule "B".

Total Number Voting	144
Necessary for Passage	73
Those voting Yea	136
Those voting Nay	8
Those absent and not Voting	7

SPEAKER STOLBERG:

The bill is passed. •••

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H84 816 PCD

AUGUST 30, 1984

BRIEF ON DEFENDANTS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR STAY

INTRODUCTION

This action was commenced by the Plaintiffs' (hereinafter Brewers) Complaint filed in this court on July 25, 1984, seeking both a Declaratory Ruling and Injunctive Relief against what the Brewers refer to as the "beer price affirmation provisions" of Connecticut Pub. Act 84-332, Pub. Act 84-432 and Section 30-63a(b) of the Connecticut Liquor Control Act . . ." The Brewers allege that these sections of the Connecticut law are violative of the Constitution of the United States, most particularly the Commerce Clause, Art. I, Sec. 8, cl. 3; and, the Supremacy Clause, Art. VI, cl. 2, through a statute of the United States regulating commerce, Section 1 of the Sherman Act, 15 U.S.C. Sec. 1.

As is evident from both the allegations of the Complaint (Complaint, paragraph 2) and the Affidavit of the Liquor Control Commission (Affidavit, par. 5b) it was the Connecticut General Assembly's clear intention and purpose to enact that legislation which would comply with the mandate of the Second Circuit Court in *U.S. Brewers Association, Inc. v. Healy*, 629 F.2nd 275 (2nd Cir., 1982) aff'd ____ U.S. ____, 104 S.Ct. 692 78 L.Ed.2d 248 (1983).

Beer Price Affirmation System

A. The previous law

Any discussion of the present Connecticut system must begin with an understanding of the beer affirmation system as it existed under the Connecticut legislative enactments of 1981. That system is most cogently and completely described in the attachments to Defendants' 9(c) Statement consisting of the U.S. District Court decision of February 16, 1982, Blumenfeld, J., and the U.S. Circuit Court of Appeals decision of November 1, 1982, Timbers, Van Graafeiland, and Kearse, J's. However, the former system may be briefly described as follows: Connecticut has a three-tier system of liquor distribution: out-of-state shippers (Brewers); Connecticut wholesalers; Connecticut retailers. Each of the above-noted sellers must hold a valid Connecticut license to sell alcoholic beverages to the tier below and, of course, in the case of the retailer, to permit sales to consumers.

When the Connecticut General Assembly passed Public Act 81-294, it thereby imposed the following structure upon the industry. The Brewers were compelled to "post" the prices for their particular product before the 13th day of the month, which price would be effective and controlling for the next succeeding month. Moreover, the prices could not change during said month. Other provisions of that old law compelled the Brewers, when arriving at the price which they were to post in Connecticut, to determine the lowest price at which the identical product *would be* offered for sale in a surrounding state (i.e., New York, Massachusetts and Rhode Island) during the succeeding month. The Brewers were also compelled to file a sworn affidavit that the posted per unit price would be no higher than the price for the corresponding units sold in any state which bordered the State of Connecticut *during the month covered by the posting.* Still another section of the same Public Act rendered it illegal for a Brewer to sell beer to a wholesaler at a unit price higher than the lowest price it was *then* charging another wholesaler for the same unit in any state bordering the State of Connecticut.

This system was vigorously attacked by the Brewers on the grounds that the Connecticut legislation was unconstitutional as violative of the Supremacy Clause and the Commerce Clause of the United States Constitution and they also presented claims of unconstitutionality pursuant to the Due Process Clause. The U.S. District Court, in an expansive and well-reasoned decision, upheld the constitutionality of the beer price affirmation provisions and disposed of all constitutional claims presented. *U.S. Brewers Ass'n v. Healy*, 532 F.Supp. 1312 (D. Conn., 1982). On appeal, the U.S. Court of Appeals for the Second Circuit determined that the Connecticut Beer Price Affirmation System was unconstitutional as violative of the Commerce Clause, perceiving that the Connecticut Statute had an 'extraterrritoral thrust' inasmuch as it regulated prices in the surrounding states as well as in Connecticut. *U.S. Brewers Ass'n v. Healy*, 692 F.2d 275 (1983). The U.S. Supreme Court affirmed the judgment of the Second Circuit Court without opinion. (Copy of decision attached to Defendants' 9(c) Statement).

B. The amended law

Turning then to the new legislation, Connecticut's 1984 beer affirmation legislation had, as its declared purpose, the intention to meet the constitutional infirmities as perceived by the Second Circuit. (See Complaint, par. 2; Legislative debates attached to Defendants' 9(c) Statement). We must, however, vigorously dispute the following allegation found in the same paragraph 2 of the Complaint: "The revised legislation, however, fails to achieve its stated objective."

We have furnished for this Court, the sworn Affidavit of Chairman Healy and Commissioner Snyder of the Department of Liquor Control of the State of Connecticut. In that Affidavit the Liquor Control Commission, whose power and duty it is under C.G.S. Sec. 30-6 to enforce and interpret the provisions of the Connecticut Liquor Control Act, clearly sets forth that agency's interpretation of the 1984 Public Acts and any impact upon existing Connecticut statutes. Pursuant to

that interpretation, the new beer price affirmation provisions, as specifically contrasted to the old system, is as follows:

C.G.S. Sec. 30-63, as amended, (Section 1 of Public Act 84-332) mandates that a Brewer, on a monthly basis, post the per unit price at which it will offer its respective product to a Connecticut wholesaler "for the month following such posting." This price will be the controlling price in Connecticut for the month following such posting. The regulations of the Department of Liquor Control (Sec. 30-6-B4, as amended on January 11, 1984, 45 C.L.J. No. 32, p. 4c, February 7, 1984 (copy attached)), mandate that such price be posted with the Liquor Control Commission on or before the 6th day of the month. Section 3(b) of Public Act 84-332, amended C.G.S. Sec. 30-63(b) of the Connecticut General Statutes, so as to mandate that:

> "[a]t the time of posting . . ., [the brewer] shall file with the Department of Liquor Control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state [*at any time during the calendar month covered by such posting.*]

The Court will please note that we have reproduced the Public Act as it appears in its Public Act form, which clearly indicates the insertions and deletions effected by the General Assembly, i.e., that portion of the former act deleted appears in brackets; that portion inserted appears in capital letters. Paragraph 35 of the Complaint however, reflects the statute as it will appear after codification by the Legislative Commissioner's Office of the State of Connecticut. (See C.G.S. Sec.

2-56(g). While it is accurate to construct the statute this way, we feel it is essential for the court to focus upon the nature of the changes which are highlighted in the Public Act form. It will not be lost upon this court that the essential changes here make it clear that the affirmation requirement of the Brewer relates to the price *at the moment of posting*, and not, as was required before, as the price "will be" during the period of posting (i.e., the month that follows) (See paragraph 5a of Liquor Commissioners' Affidavit).

Interpretation of the Law

The gravamen of Plaintiffs' Complaiant here is that the Connecticut General Assembly did not effectuate its declared purpose of amending the law so as to conform to the Court of Appeals' decision. They point, again accurately, to the fact that no amendatory language was employed, and no existing language was deleted, from Section 30-63a(b). We cannot but agree that this is literally true. The statute still reads:

> (b) No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out of-state shipper to any wholesaler in any state bordering this state.
>
> C.G.S. Sec. 30-63a(b)

Standing alone this section purports to concern the sale by the Brewers of a product in Connecticut at a price no lower than the then existing lowest price being charged in a border state. However, we direct this court to the Affidavit of the Liquor Control Commissioners, and specifically, paragraph 5b. As noted in that Affidavit, the Liquor Control Commission

is the agency charged with the enforcement of the Liquor Control Act, C.G.S. Sec. 30-6. Pursuant to that authority, the Liquor Control Commission is empowered and obligated to enforce the provisions of the Liquor Control Act and, by necessary implication, to interpret those same provisions. The Liquor Control Commission has now formally declared that its interpretation of the command of Section 30-63a(b) is *not* as feared by the Brewers. That is, the Liquor Commission has determined that the sale of a particular product to a Connecticut wholesaler by a Brewer, at a price which is at that particular instant in time, higher than the lowest price for the corresponding product in a bordering state is neither illegal under, nor prohibited by, the Connecticut law. The Liquor Commission has declared moreover, that the Brewer need only sell to a Connecticut wholesaler at the 'posted price', and that a sale at such 'posted price', (assuming a proper affirmation at the time of posting) is permissible. That is all that is requested and/or expected.

The Liquor Commission based its interpretation upon the expressed intention of the General Assembly as found in the words of Senator Dorr:

> "This Bill, Mr. President, would alter existing price affirmation requirements and would include wine in the new price posting affirmation system. Prices on all alcoholic beverages sold in Connecticut would be posted on a monthly basis with the Division of Liquor Control but any affirmation as it reflects prices charged anywhere else in the country would apply only to the price existing at the time of posting and not for the entire month after as is currently required, Mr. President.
>
> This Bill would specifically allow manufacturers and shippers to change wholesale prices on (sic) all other states and the District of Columbia at any time during the calendar month covered by the Connecticut posting."
>
> 1984 Conn. Gen. Assembly, Sen. Proc. (April 18, 1984) p. 1278. See Legislative Debates, Defendants' 9(c) Statement, Exhibit A.

Indeed the Connecticut Liquor Commissioners, in their Affidavit at Par. 5(c), point to the existence of the *new* language of Sec. 3(e) of P.A. 84-332 as compelling the conclusion that Brewers *must* remain free, during the period of posting to raise or lower their prices in adjoining states.

> (e) THIS SECTION SHALL NOT PROHIBIT A MANUFACTURER OR OUT-OF-STATE SHIPPER PERMITTEE OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER FROM CHANGING PRICES TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OR A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS AT ANY TIME DURING THE CALENDAR MONTH COVERED BY SUCH POSTING.
>
> P.A. 84-332, Sec. 3(c).

Quite clearly the Liquor Commission in the State of Connecticut is a state agency as defined in Section 4-176 of the Conn. Gen. Stat. Just as clearly, the Liquor Control Commission:

> " . . . may, in its discretion, issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency. . . "
>
> Sec. 4-176, C.G.S.

The Liquor Commission, pursuant to this authority, in the affidavit filed herewith, and, therein by its Declaratory Ruling, interprets the applicability of these statutory provisions. We submit, it has, in so doing, correctly determined a matter of state law. It has, in so doing, followed the dictates of the canon of statutory construction, time and again ratified by the Connecticut Supreme Court, which instructs that an

agency or court in the State of Connecticut, must, whensoever possible, interpret a statute in a manner which renders such statute constitutional:

> "We have consistently held that every presumption should be made in favor of the constitutionality of a statute, and it will be sustained unless its invalidity is established beyond a reasonable doubt. *State v. Warren*, 169 Conn. 207, 217, 363 A.2d 91 (1975); *Lublin v. Brown*, 165 Conn. 212, 219, 362 A.2d 769 (1975); *Wilson v. Connecticut Product Development Corporation*, 167 Conn. 111, 114 355 A.2d (1974). Moreover, we have asserted that, where a statute permits two constructions, one valid and the other invalid as unconstitutional, the valid construction should be adopted, *even where it is not the obvious one. Lublin v. Brown*, supra, 219-20."
>
> *Engle v. Personnel Appeal Board*, 175 Conn. 127, 134, 394 A.2d 731 (1978). (emphasis added)
>
> See also: *Grega v. Warden*, 178 Conn. 207, 423 A.2d 813 (1979); *Kellems v. Brown*, 163 Conn. 478, 313 A.2d 53, appeal dismissed, 409 U.S. 1099.

The Connecticut General Assembly and the Liquor Commission were, and are, mindful of the decision of the U.S. District Court of Appeals in, *U.S. Brewers Association, Inc. v. Healy*, supra, and the unconstitutional extraterritorial thrust of the former Connecticut beer price affirmation provisions. The General Assembly clearly intended to meet those stated objections to the law (see Complaint, par. 2; Legislative Debates). The Liquor Commission has determined it will not stiffle or thwart that intention in keeping with the principle that,

> "In fact, '[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if a reliance on that language would defeat the plain purpose of the statute.' "
>
> *Brothers v. First Leasing*, 724 F.2d 789 citing, *Bob Jones University v. U.S.* ___ U.S. ___, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983).

Furthermore, were the Liquor Commissioners to interpret C.G.S. Sec. 30-63a(b) in the literal and strict manner advocated by the Brewers, it would, in effect, be concluding that Section 3(e) of P.A. 332, was a meaningless, superfluous action of the General Assembly. A time honored rule of Connecticut statutory construction precludes such a result. *Harris Data Communications, Inc. v. Heffernan*, 183 Conn. 194, 197 438 A.2d 1178 (1981); *Winchester v. Conn. State Board of Labor Relations*, 175 Conn. 349, 402 A.2d 332 (1978); *Grievance Committee v. Dacey*, 154 Conn 129, 138, 222 A.2d 339 (1966). Indeed, the words of the Connecticut Supreme Court, uttered just this month, seem particularly appropriate in this case:

> "Thus, if the 1981 statute does not apply to existing distributorships, neither did the 1971 enactment. If, as we assume, the purpose of the 1971 statute was to regulate what the legislature perceived as abuses in the liquor industry, then it would have labored mightily to have produced so inconsequential a piece of legislation, one that would have had no effect on existing distributorships of whatever duration and would have permitted a few manufacturers or out-of-state shippers to dominate the state liquor industry. Unless the statutory language expressly requires it we cannot attribute to the legislature an intent to produce an unworkable statute.
>
> *Schieffelin & Co. v. Department of Liquor Control*, 194 Conn. 165, 176, ____ A.2d ____ (1984).

Thus the Liquor Control Commission correctly refuses to conclude that the General Assembly "labored mightily" to enact a beer affirmation system compatible with *Healy*, supra, and yet "produced so inconsequential (or ineffective) a piece of legislation."

Constitutionality of the Amended Law under the Commerce Clause

We respectfully submit that the *new* beer affirmation system as designed and intended by the General Assembly, and as it is to be *enforced* by the Department of Liquor Control, fully comports with the well established Commerce Clause standards established by the U.S. Supreme Court in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

We direct this court's attention to the cogent analysis of the 'old' Connecticut beer affirmation statutes embodied in Judge Blumenfeld's decision in *U.S. Brewers Ass'n v. Healy*, 532 F.Supp. 1315. Clearly, that analysis remains relevant and persuasive since the new system retains most of the original components, save that aspect thereof which, in the opinion of the U.S. Court of Appeals, gave the statutes a constitutionally impermissible extraterritorial thrust.

Judge Blumenfeld's opinion, after discussing the general principles applicable to any type of Commerce Clause analysis, reached the following conclusions:

> The Connecticut system was not "protectionist" in purpose since there are no Connecticut Brewers to serve as the ignoble beneficiaries of blatant discrimination nor did that statute seek 'lower' or 'better' prices for Connecticut wholesalers/retailers, vis-a-vis out-of-state wholesalers/retailers, but simply equal prices. 532 F.Supp. 1312, 1323-1324.
>
> The Connecticut system did not foster a discriminatory effect upon any of these parties for essentially the same reasons, i.e., the absence of any Connecticut Brewers and the achievement of price parity rather than lower price supremacy. 532 F.Supp. 1312, 1324.
>
> The Connecticut system did not create a structure which imposed an impermissible burden on interstate commerce:

> The plaintiffs argue quite forcefully that the statute's effect on their marketing practices will be so disruptive as to constitute a burden on interstate commerce. They point to several specific aspects of their marketing practices which will have to be altered in order to comply with the Connecticut statute. In addition, plaintiffs argue that the price affirmation statute will have "dislocating effects on competition in the bordering states," constituting a substantial burden on commerce.
>
> 532 F.Supp. 1312, 1325 footnotes omitted).

A review of the allegations of the instant complaint, contrasted with the above excellent synopsis of the brewers' former claims results inevitably in the conclusion that the claims are virtually identical. Hence, the conclusion of the District Court should, we submit, remain firm and unchanging:

> While the beer price affirmation statute may interfere with the 'natural functioning of the interstate market' and force changes in the 'particular structure or methods of operation' in the beer market, *Exxon v. Maryland*, makes it clear that this alone does not constitute an impermissible burden on interstate commerce.
>
> • • •
>
> The basic beer pricing decisions which underlie the brewer's competitive strategies is left to them, and *each* may strike the balance it chooses. I therefore hold that the beer price affirmation statute does not place an impermissible burden on the movement of beer in interstate commerce.
>
> 532 F.Supp. 1312, 1337

The Court of Appeals did not disagree with any of these conclusions of the District Court. On the contrary, we submit that any fair reading of its decision leads inevitably to the conclusion that the Court of Appeals concurred fully in the analysis. Else, why would the court devote four comprehensive footnotes in its decision to a re-iteration of the lower court reasoning and conclusions? See 692 F.2d 275, 281 n. 12, 282 ns. 13–15. Significantly, the court could, with an eye to judicial efficiency, simply have indicated the non-necessity of reviewing any portion of the District Court's decision (and thereby signify its reluctance?), for as it did say and find:

> . . . . the beer price affirmation provisions on their face [constitute] an impermissible burden on commerce, for it is evident that the Connecticut statute seeks to regulate prices not just in Connecticut but in its surrounding states as well."
>
> 692 F.2d 275, 282

We submit, that the U.S. Court of Appeals devotion of a considerable portion of its decision to the findings and conclusions of the District Court constitutes, at a minimum, an implicit recognition of the legal soundness and accuracy of that decision. Thus, the Court of Appeals very precisely isolated the only constitutional infirmity which it found to exist:

> But the extraterritorial thrust of the main beer price affirmation provisions, §§ 30-63a(b) and 30-63b(b), . . . , is plain, for those sections *prevent a brewer from selling below the Connecticut wholesaler price* to any wholesaler in any neighboring state. In other words, these sections tell a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has *previously announced* it will charge to Connecticut wholesalers.
>
> 692 F.2d 275, 282

As we hope we have previously demonstrated in this brief, the new Connecticut law does not, (and the Liquor Control Commission so interprets the new law) "prevent a brewer from selling below the Connecticut wholesale price." Indeed that Connecticut wholesale price is the price which the brewer had previously set and used during the prior month in one of the surrounding states, since the new C.G.S. Sec. 30-a(b) quite clearly insists only that the Brewer affirm that the 'posted price' is the lowest charged at that precise moment in time (i.e., at the time of the posting) and, not, as was the case under the old affirmation law, during the entire effective period of posting. Hence, the Connecticut General Assembly, clearly deleted the offensive and '*thrusting*' phrases: "during the period of the posting will be"; "or will be"; and "at any time during the calendar month covered by such posting". (See P.A. 84-332, Sec. 3(b), and the bracketed phrases therein, which signify deletions).

Of perhaps the greatest significance we again draw the court's attention to the complete text of Sec. 3(e) of P.A. 84-332:

> (e) THIS SECTION SHALL NOT PROHIBIT A MANUFACTURER OR OUT-OF-STATE SHIPPER PERMITTEE OR THE AUTHORIZED REPRESENTATIVE OF A MANUFACTURER FROM CHANGING PRICES TO ANY WHOLESALER IN ANY OTHER STATE OF THE UNITED STATES OR IN THE DISTRICT OF COLUMBIA, OR TO ANY STATE OR AGENCY OF A STATE WHICH OWNS AND OPERATES RETAIL LIQUOR OUTLETS AT ANY TIME DURING THE CALENDAR MONTH COVERED BY SUCH POSTING.

We respectfully remind this court that each and every of the foregoing words in Section 3(e) constitutes new and added language inserted by the Connecticut General Assembly to meet the objections articulated by the Court of Appeals. It thus belies logic to assert that the Brewers cannot change prices in border states during the period of posting.

Thus we submit that the new affirmation provisions of the Connecticut law constitute a virtual replica of the New York system which was found to be in compliance with the Constitution by the U.S. Supreme Court:

> We need not now decide whether the mode of liquor regulation chosen by the State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. See *Baldwin v. G.A.F. Seelig*, 294 U.S. 511. No such situation is presented in this case. The mere fact that 9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country.
>
> *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42-43 (1966).

The Court of Appeals found our reliance upon *Seagram* to be 'misplaced', when asserted as supporting the former affirmation provisions, 692 F.2d 275, 283. However, the following language of that same decision makes it convincingly clear that such reliance, *now*, is not only appropriate but, we submit, conclusive:

> In *Seagram*, the Court considered a New York law that required liquor manufacturers to post monthly price schedules for sales of liquor in New York, with "an affirmation that 'the bottle and case price of liquor is no higher than the lowest price' at which sales were made anywhere in the United States during the *preceding month*." 384 U.S. at 39-40 (Emphasis added). The New York Statute differed significantly from the Connecticut statute, because, unlike Connecticut's beer price affirmation

> provisions which control brewers' future conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, d[i]d not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.
>
> Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states, *see* 384 U.S. at 43–45, leaving those out-of-state prices unregulated by Connecticut. But nothing in *Seagram* purports to rule that a state may achieve its goal of price-parity by the far more drastic, and clearly excessive, method of controlling the minimum prices at which liquor may be sold outside its own territory.
>
> 692 F.2d 275, 282

The new Connecticut law 'merely requires that Connecticut prices reflect what had been charged elsewhere in the past.' The new Connecticut law 'does not limit the freedom of a brewer at any given time to raise or lower prices in any other state'. Indeed, the new Connecticut law has not gone as far as the Court of Appeals said it might since it has not imposed a 'requirement that a brewer set its Connecticut prices at the lowest level it simultaneously chooses to sell in the surrounding states.'

Simply put, the new Connecticut law meets all established constitutional criteria and must be permitted to operate upon the beer industry *within* the State of Connecticut.

Constitutionality of the Amended Law under the Sherman Act and Supremacy Clause

Count IV of the Complaint, pars. 53–56, alleges that Connecticut's beer price affirmation provisions, in conjunction with Connecticut's price posting requirement, violate Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, and thus contravene the Supremacy Clause of the Constitution of the United States, Art. VI, cl. 2.

This *precise* issue was raised and decided adversely to the plaintiffs in *United States Brewers Ass'n. Inc. v. Healy*, 532 F.Supp. 1312, 1329–30 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982). The Second Circuit did not reach the Supremacy Clause issue, 692 F.2d at 278.

Simply stated, neither the affirmation nor the price posting requirements permanently condone, authorize, require or compel an *agreement* between or among two or more private parties. Such an agreement is an essential prerequisite to finding a violation of Section 1 of the Sherman Act.

There exists no material differences, for purposes of Sherman Act/Supremacy Clause analysis, between the statutes at issue in *Healy* and the instant action. Judge Blumenfeld stated:

> It is also clear that the beer price affirmation statute requires only unilateral action by each brewer and importer. It does not require conduct which the antitrust laws forbid, and does not exert "irresistible economic pressure" on the plaintiffs to violate the Sherman Act. It follows that the statute does not implicate the Supremacy Clause, and, therefore, plaintiffs' argument must be rejected.

532 F.Supp. at 1330. See also, *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981) *aff'g sub nom. Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F. Supp. 936 (D. Conn. 1981).

For the foregoing reasons, the Defendants Motion for Summary Judgment with respect to Count IV of Plaintiffs' Complaint should be granted.

Abstention

Should this court determine either that it is not bound by the Liquor Commission's interpretation of the new Connecticut affirmation law or finds itself in disagreement with that interpretation, we respectfully submit that the court should invoke the doctrine of abstention and refuse to entertain this action with respect to the Commerce Clause issues only.

The U.S. Supreme Court has repeatedly articulated its position regarding when and under what circumstances, a federal court should properly invoke the doctrine of abstention. *Railroad Commission of Texas v. Pullman Company*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941); *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1975).

The Second Circuit, when called upon to construe this *Pullman* abstention rule, has established a three-fold test which must be satisfied before a federal court should refuse jurisdiction:

> [1] the state statute [must] be unclear or the issue of state law [must] be uncertain
>
> ; [2] the resolution of the federal issue [must] depend upon the interpretation to be given to the state law, . . . and
>
> ; [3] the state law [must] be susceptible of an interpretation that would avoid or modify the federal constitutional issue.
>
> *McReamond v. Wilson*, 533 F.2d 757, 761 (2d Cir., 1976).

Assuming unacceptance of the Liquor Commission interpretation, then the state statute is 'unclear' or 'uncertain'. It is certainly obvious that this case, and its Commerce Clause implications, hinges on the effect of the Connecticut Legislature's 1984 amendments, an issue of statutory construction of first impression and, clearly a matter of "interpretation to be given to the state law. Finally, the Liquor Commission's judgment shows, if nothing else, that the state statute is "susceptible of an interpretation that would avoid or modify the federal constitutional issue." The latter is especially true in light of the Complaint herein which clearly attacks the statute as failing to achieve its stated objective, i.e., to conform to *U.S. Brewers Association, Inc. v. Healy*, supra.

This Complaint is founded solely on a reading of state law which is repugnant to the reading given by the very agency charged with its enforcement. Since that reading is the issue, then we submit, the courts of the State of Connecticut become the only appropriate forum for adjudication. Moreover, since the Liquor Commission shall enforce the affirmation laws consistent with its interpretation, then the Brewers simply are not at risk pending state court adjudication. (Incidentally we note that the Brewers, because of the Declaratory Ruling issued by the Commission, have immediately available to them, recourse to the Courts via C.G.S. Sec. 4-175 and 4-176).

We are constrained to observe that the foregoing argument regarding the doctrine of abstention is confined to the 'Commerce Clause' aspect of this litigation. We have hereinbefore presented our views concerning the 'Supremacy Clause' issues. Suffice it to say, we do not advocate that this court 'abstain' regarding the antitrust allegations, but rather assert that summary judgment may be rendered thereupon.

CONCLUSION

For all the foregoing reasons, we urge this court to render Summary Judgment for the Defendants.

In the alternative, we seek Summary Judgment for the Defendants on the Sherman Act/Supremacy Clause issue and urge the court to stay action on the Commerce Clause issue until the Connecticut Supreme Court renders judgment on the correct interpretation of the statute involved, which would obviate this constitutional issue.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli/gmb

Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ R. Langer /s/ LFM

Robert M. Langer
Assistant Attorney General
30 Trinity Street
Hartford, Conn. 06115
Tel: 566-5374

[Certificate of Service omitted in printing]

[Attachments omitted in printing]

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 17, 1983

Mr. Richard M. Sheridan
555 Russell Road
P.O. Box 11424
Newington, CT 06111

Re: John F. Healy, et al., v.
United States Brewers Association, Inc., et al.
No. 82-1493

Dear Mr. Sheridan:

The Court today entered the following order in the above entitled case:

The judgment is affirmed. Justice White, Justice Rehnquist and Justice O'Connor would note probable jurisdiction and set the case for oral argument. Justice Powell took part in the consideration or decision of this case.

Very truly yours,

Alexander L. Stevas, Clerk

/s/ Alexander L. Stevas

DEPARTMENT OF LIQUOR CONTROL

Permits for the Manufacture and Sale of Alcoholic Beverages

Section 1: Section 30-6-A3 of the Regulations of Connecticut State Agencies is amended to read as follows:

Sec. 30-6-A3. Renewal applications

Every renewal application, accompanied by the proper fee in the form of a certified check, postal money order or bank check, shall be filed with the department at least twenty-one days prior to the expiration date of the existing permit. Every renewal application for an on-premises consumption permit, except airline, boat and railroad permit shall be accompanied by: approval from the local fire marshall, and a notarized copy of the license from the commission on special revenue if the permit is provided for by sec. 30-33b of the general statutes. Applicants for renewal permits shall submit photographs as indicated in section 30-6-A1 only if the department determines that such are necessary to examine and document whether the premises is being operated in violation of the liquor control act or the regulations of the department.

Statement of Purpose: To delete requirement that druggist proprietors submit certificate of fitness from the pharmacy commission in coordination with the deletion of this requirement from the statutes by Public Act 82-332, Sec. 8, and to delete the requirement that all renewal applicants submit photographs. The later provision is changed to require such photographs only if the Department finds it necessary, thus bringing the regulation into conformity with modern Department practices, and eliminating an additional source of expense for those licensed by the Department.

Section 2: Section 30-6-B4 of the Regulations of Connecticut State Agencies is amended to read as follows:

Sec. 30-6-B4. Out-of-state shipper price lists to be filed

(a) Every out-of-state shipper permittee shall, annually on or before the sixth day of January, file with the department of liquor control, on forms prescribed by the department, one copy of a complete schedule, with each page of such schedule numbered in numerical order, duly verified by the permittee and attested by the backer, if an individual, or if the backer is a corporation, by an officer of such corporation, of all alcoholic liquors offered for sale in Connecticut, which shall contain with respect to each item: (1) The type of beverage and brand name; (2) the size of the container; (3) the age or per cent and type of neutral spirits; (4) the proof; (5) the number of bottles per case; (6) the bottle and case price. The following information shall be submitted by out-of-state shipper beer only permittees: (1) The type of beverage; (2) the size of the container (barrel, half-barrel, quarter-barrel); (3) the number and size of bottles per case; (4) the container price and case price. At the same time that these schedules are mailed to the department, a copy shall be forwarded to each wholesaler licensed by the department to distribute those products for which the schedule is intended.

(b) Except in the case of still wines and sparkling wines, the case price shall be individual for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item contained in the multiple package, the unit price, and the case price. The bottle price posted in such multiple package case must be the same as the bottle price posted in a case containing the one type and brand of wine. The price set forth therein shall become effective on the first day of the calendar month following the effective filing date thereof and, unless withdrawn or amended, shall be considered refiled and effective each month until the filing date of the next complete schedule. All items shall be bona fide offering of the items set forth in the

list. Price changes and prices on new items may be filed on supplemental price schedules, which schedules shall be filed on the sixth day of any intervening month, and prices on such supplemental schedules shall become effective on the first day of the month following the effective filing date thereof. When filing supplemental price lists showing amended prices, one copy of the whole numbered page on which the original prices appeared shall be filed. One copy of such supplemental price list shall be filed, with a copy to the wholesaler licensed to distribute the product.

(c) Except in cases where an obvious typographical error has been made, no changes, corrections or additions will be considered after the effective filing date. The effective price on any item shall be the price posted on the latest schedule on file on which that particular item appears.

(d) No out-of-state shipper may ship, transport, sell or offer for sale in Connecticut any brand of alcoholic liquor which does not appear on his price schedule.

(e) A violation of any of the provisions of this section shall be punishable by suspension or revocation.

Statement of Purpose: To require shippers to post their prices to wholesalers by the sixth day of each month, instead of by the thirteenth day as previously required. The additional time is needed because additional, time consuming procedures added by P.A. 81-294, Sec. 10 make it difficult to meet existing regulatory and statutory deadlines. The contemporaneous mailing to the affected wholesalers will afford them more time to comply with the requirements of this Public Act.

Section 3: Section 30-6-B7 of the Regulations of Connecticut State Agencies is amended to read as follows:

Sec. 30-6-B7. Consignments; return of goods; authorized distributors

No out-of-state shipper permittee shall sell alcoholic liquors on consignment. No manufacturer, wholesaler or out-of-state shipper permittee shall take back any merchandise once sold, billed, shipped, delivered or received by any permittee unless such transaction has been approved by the department. A full and complete explanation of all circumstances shall accompany any request to take back merchandise. Each manufacturer and out-of-state shipper permittee shall file with the department a list of his authorized distributors, setting forth the brands and also the exact geographical area in which the distributor or wholesaler shall be authorized to sell, and shall also file a certificate from the wholesaler to the effect tht he is, in fact, servicing the area designated and no other area for the brand or brands for which he has been appointed as distributor. Where a wholesaler has held a distributorship for less than six months, no change on the list of authorized distributors or wholesalers of a manufacturer or out-of-state shipper shall be made except after ninety days' notice by registered mail to all such authorized distributors or wholesalers affected by such change which appear on the list of the particular manufacturer or out-of-state shipper as recorded in the office of the department of liquor control, and except after ninety days' like notice to and approval by the department. Such changes may be made without waiting the ninety days with the approval of the department where waivers are executed by the distributors or wholesalers concerned, or where the geographical area of distribution has not been already allocated to a distributor or wholesaler, or after a hearing has been held, upon presentation of sufficient evidence of any violation of the liquor control act or regulations of the department, or evidence of any other act detrimental to the orderly conduct of the business, in which a present authorized distributor or wholesaler has been involved. The notice of change shall indicate that the name of the permittee is to be an additional distributor or wholesaler or, in the case of eliminating the name of a present distributor or

wholesaler, with or without substituting another permittee's name, the notice of the change shall so indicate an "elimination" or "substitution." Geographical areas of distribution shall be submitted either by townships or counties or statewide, and any change in geographical area of distribution shall fully conform to the same essential conditions as required in the notice of change to distributors or wholesalers.

Statement of Purpose: To amend the time limits in the regulation in coordination with changes made by Public Act 81-367.

Section 4: Section 30-6-B12 of the Regulations of Connecticut State Agencies is amended to read as follows:

Sec. 30-6-B12. Manufacturer and wholesaler price lists to be filed

(a) Each manufacturer and wholesaler permittee shall, annually, on or before the twelfth day of December, file with the department of liquor control on forms prescribed by the department one copy of a complete schedule, with each page of such schedule numbered in numerical order, duly verified by the permittee and attested by the backer if an individual or, if the backer is a corporation, by an officer of such corporation, of all alcoholic liquors offered for sale in Connecticut. These lists shall contain with respect to each item: (1) The type of beverage and brand name; (2) the size of the container; (3) the age or per cent and type of neutral spirits; (4) the proof; (5) the number of bottles per case; (6) the bottle price and case price which shall include all customs, duties, federal taxes, state taxes and cost of delivery to the permittee. If a manufacturer or wholesaler sells to another manufacturer or wholesaler, the prices shall be submitted on a separate schedule; (7) the name of the publication or publications the prices will appear in. If not published, the affidavit required by subsection (g) shall be submitted. The following information shall be submitted only by manufacturer and wholesaler beer permittees: (1) The type of beverage; (2) the size of the container

(barrel, half-barrel, quarter-barrel); (3) the number and size of bottles per case; (4) the container price and case price; (5) the name of the publication or publications the prices will appear in. If not published, the affidavit required by subsection (g) shall be submitted.

(b) Except in the case of still wines and sparkling wines, the case price shall be individual for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item contained in the multiple package, the unit price, and the case price. The bottle price posted in such multiple package case must be the same as the bottle price posted in a case containing the one type and brand of wine. The price set forth therein shall become effective on the first day of the calendar month following the effective filing date thereof and, unless withdrawn or amended, shall be considered refiled and effective each month until the filing date of the next complete schedule.

(c) Price changes and prices on new items may be filed on supplemental price schedules, which schedules shall be filed on or before the twelfth day of any month, and the prices on such supplemental schedules shall become effective on the first day of the month following the effective filing date thereof. One copy of such supplemental price schedules showing amended prices shall be filed and only price changes and prices on new items should be listed.

(d) No changes, corrections or additions will be considered after the effective filing date, except in cases where obvious typographical errors have been made and except where otherwise allowed by statute.

(e) No manufacturer or wholesaler permittee may sell or offer for sale any brand of alcoholic liquor which does not appear on his price schedule. All items listed shall be bona fide offerings of the items set forth in the list and each manufacturer and wholesaler, upon request of the department,

shall furnish the department with an inventory of any items that appear on his list. All liquor sold in less than case units at wholesale shall be sold at the per bottle price posted.

(f) All liquors shall be shipped and received by the purchaser in the same period for which the prices set forth in the invoices are in effect.

(g) Each manufacturer and wholesaler shall furnish each permittee customer with a copy of his price schedule, as amended, either by direct mail or by publishing his price schedule in any publication approved by the department of liquor control, provided, in accordance with the method used, the manufacturer, wholesaler or publication shall, on or before the tenth day of the month for which such schedule is effective, submit an affidavit that the provisions of this section have been complied with. If the manufacturer or wholesaler permittee solicits a new account, he shall, before making any sales, present a current price schedule to such account.

(h) A manufacturer or wholesaler posting prices on private labels shall submit those prices on separate sheets distinctly marked "Private Labels."

(i) Each price schedule filed shall contain the statement that the manufacturer or wholesaler is a "present authorized distributor" of all brands on which prices are quoted. If for any reason a manufacturer or wholesaler files prices on any items or brands of which he is not an authorized distributor, such items shall be filed every month even though they remain the same. Such items shall be disposed of within three months and shall not be listed on more than three successive lists without permission of the department and the department will strike from the list those items unless the distributor presents the department with satisfactory reasons for not doing so.

(j) A violation of any of the provisions of this section shall be punishable by suspension or revocation.

Statement of Purpose: To require manufacturers and wholesalers to post their prices to retailers by the twelfth day of each month, instead of by the fifteenth day as previously required. The additional time is needed because additional, time consuming procedures added by P.A. 81-294, Sec. 10 make it difficult or impossible to meet existing regulatory and statutory deadlines.

[Certifications omitted in printing]

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

CIVIL ACTION FILE NO. H 84 816 PCD

SEPTEMBER 19, 1984

MOTION TO INTERVENE AS A DEFENDANT

Wine and Spirits Wholesalers of Connecticut, Inc., as an association, and on behalf of Johnny Barton, Inc., The Brescome Distributors Corporation, Connecticut Distributors, Inc., Eder Bros., Inc., Gallo Wine Merchants, Inc., Allan S. Goodman, Inc., and Hartley & Parker Limited, Inc., its members selling alcoholic liquor in the State of Connecticut, moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, a copy of which is attached, on the following grounds:

1) The applicant Wine and Spirits Wholesalers of Connecticut, Inc. and its members are subject to the price affirmation provisions of the Connecticut Liquor Control Act and Conn. Pub. Act. 84-332 and Pub. Act 84-432, and claim an interest relating to the property or action which is the subject matter of this suit.

2) The applicant Wine and Spirits Wholesalers of Connecticut, Inc. and its members are engaged in the sale of alcoholic liquor in Connecticut as defined in Section 30-1 of the Connecticut Liquor Control Act of the Connecticut General Statutes. Public Act 84-332, Public Act 84-432, and C.G.S. Section 30-63a(b), the beer price affirmation provisions which are the subject matter of the instant suit, are substantially similar in language and effect to the affirmation provisions

pertaining to alcohol and spirits [See for example C.G.S. Sec. 30-63a(a)] and wine [See for example P.A. 84-332]. Because of the similarity in the provisions, any adverse ruling as to the constitutionality of the beer price affirmation provisions raises a substantial question as to the constitutionality of the alcohol and spirits affirmation provisions and recently enacted wine affirmation provisions.

3) The disposition of this action may as a practical matter impair or impede the applicant's ability to protect its interest, in one or more of the following ways:

A. An adverse disposition as to the constitutionality of the beer provisions may have an adverse effect on future litigation by impairing the applicant's ability to defend the constitutionality of the alcohol and spirits and or newly enacted wine affirmation provisions;

B. The applicant's involvement in this suit may lessen the need for future litigation to protect its interests;

C. The applicant will potentially and actually suffer some economic loss as a result of an adverse ruling as to the constitutionality of the beer affirmation provisions.

In light of the foregoing, the applicants' interest cannot be adequately represented by existing parties.

The applicant therefore seeks to intervene as of right pursuant to F.R.C.P. 24(a).

BAILEY AND WECHSLER

By /s/ Alfred F. Wechsler

(A member of the firm)
One Financial Plaza
Hartford, CT 06103
Tel. No.: (203) 525-9191

By /s/ William A. Wechsler

(A member of the firm)
One Financial Plaza
Hartford, CT 06103
Tel. No.: (203) 525-9191
Attorneys for WINE AND
SPIRITS WHOLESALERS
OF CONNECTICUT, INC.;
JOHNNY BARTON, INC.;
THE BRESCOME
DISTRIBUTORS
CORPORATION:
CONNECTICUT
DISTRIBUTORS, INC.;
EDER BROS., INC.;
GALLO WINE
MERCHANTS, INC.;
ALLAN S. GOODMAN, INC.; AND
HARTLEY AND PARKER
LIMITED., INC.

SO ORDERED:

_____

U.S.D.C. Judge

[Certification of Service omitted in printing]

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

Civil Action File No. H84 816 PCD

ANSWER OF WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.

September 19, 1984

ANSWER

FIRST DEFENSE

Count I

1. The Defendant admits the allegations in paragraphs 1, 8-24, and 29-31.

2. The Defendant denies the allegations in paragraphs 3-7, 39, 41-43, 45 and 46.

3. The Defendant admits the first sentence in paragraph 2 and denies the rest.

4. As to the allegations in the first sentence of paragraph 25, the Defendant does not have sufficient knowledge upon which to form a belief and therefore denies same and leaves Plaintiffs to their proof thereof. The remainder of the paragraph is admitted.

5. The Defendant does not have sufficient knowledge upon which to form a belief as to paragraph 26 and therefore denies same and leaves Plaintiffs to their proof thereof.

6. As to paragraph 27, the Defendant admits the allegations with respect to beer, but notes that any geographic territorial limits within Connecticut imposed on Connecticut wholesalers are established at the choice of the appointing out-of-state shipper pursuant to C.G.S. Sec. 30-63(a) and Sec. 30-6-B7 of the Regulations of Connecticut state agencies.

7. The first three sentences of paragraph 28 are admitted. The remainder of the paragraph is denied.

8. Paragraph 32 is denied inasmuch as it is argumentative and interprets court decisions which speak more accurately for themselves.

9. The last sentence of paragraph 33 is denied. The rest and remainder of the paragraph is admitted.

10. The Defendant essentially admits paragraph 34 except to note that Public Act 84-332 added new language that prices be posted "on a monthly basis" and to note that the law does not employ the term "goods".

11. The Defendant essentially admits the allegations as to paragraph 35 with the exception that the actual language used by the legislature, identifying deletions (in brackets) and additions (in capital letters) is as follows:

> (b) At the time of posting of the bottle, can, keg or barrel and case price required by Section 30-63, AS AMENDED BY SECTION 1 OF THIS ACT, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that AT THE TIME OF POSTING the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees [during the period of the posting will be] IS

no higher than the lowest price at which each such item of beer is [or will be] sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. [at any time during the calendar month covered by such posting.]

12. That portion of paragraph 36 which reads ". . . which was not amended, and remains in full force and effect . . ." is denied. The rest and remainder of the paragraph is admitted.

13. As to paragraph 37, that portion which reads ". . . Section 3(c) of Pub. Act 84-332, which creates a new Section 30-63(e) of the Liquor Control Act, declares that the affirmation requirement does not prohibit an out-of-state shipper from changing prices in the Border States, . . ." is admitted. The remainder of the paragraph is denied.

14. The last sentence of paragraph 38 is denied. The remainder of the paragraph is admitted.

15. That portion of paragraph 40 which reads, "Finally, the beer price affirmation provisions not only mandate the price at which beer must be sold in Connecticut and below which it cannot be sold in the Border States . . ." is denied. The remainder of the paragraph is admitted.

16. The Defendant's answers to paragraphs 1-43 are hereby incorporated and made Defendant's answer to paragraph 44.

Count II

1. The Defendant's answers to paragraphs 1-46 of Count I are hereby incorporated and made Defendant's answer to paragraph 47.

2. Paragraphs 48 and 49 are denied.

Count III

1. The Defendant's answers to paragraphs 1-49 of Counts I and II are hereby incorporated and made Defendant's answer to paragraph 50.

2. Paragraphs 51 and 52 are denied.

Count IV

1. Paragraphs 53, 54 and 5 are denied.

2. As to the first two sentences of paragraph 55, the Defendant does not have sufficient knowledge upon which to form a belief and therefore denies same and leaves Plaintiffs to their proof thereof. The third sentence is admitted. The remainder of the paragraph is denied.

Irreparable Injury

1. Paragraph 57 is denied.

SECOND DEFENSE

1. The Complaint fails to state a claim against the Defendant upon which relief can be granted.

2. The beer price affirmation provisions, as amended, do not control prices at which beer may be sold outside of the state in violation of the Commerce Clause of the U.S. Constitution.

3. The beer price affirmation provisions, as amended, do not create a statutory mechanism which protects against interstate competition in violation of the Commerce Clause of the U.S. Constitution.

4. The beer price affirmation provisions, as amended, do not create a statutory mechanism which imposes an undue and excessive burden on interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

5. Inasmuch as the beer price affirmation provisions are not yet in effect, this case is in the same posture as the case of *Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 US 35 (1966) and should be likewise dismissed.

6. Plaintiffs have presented no facts which demonstrate that the beer price affirmation provisions, as applied to this case, constitute an unlawful burden on interstate commerce.

7. The State interests in this case, embodied in the beer price affirmation provisions as amended by the Connecticut General Assembly pursuant to the Twenty-first Amendment of the U.S. Constitution outweigh the purported interests of the Plaintiffs allegedly protected by the Commerce Clause of the U.S. Constitution.

THIRD DEFENSE

1. The Complaint fails to state a claim against the Defendant upon which relief can be granted.

2. The beer price affirmation provisions, as amended, do not create a statutory mechanism which is violative of the Sherman Act or the Supremacy Clause of the U.S. Constitution.

3. The beer price affirmation provisions as amended, establish a statutory mechanism which is immune from the Sherman Act under the State Action Immunity Doctrine, also referred to as the *Parker v. Brown* Doctrine.

FOURTH DEFENSE

1. The Complaint fails to state a claim against the Defendant upon which relief can be granted.

2. The beer price affirmation provisions, as amended and as interpreted by the Connecticut Department of Liquor Control, correct the deficiencies which caused the former law to be held unconstitutional in *U.S. Brewers Ass'n v. Healy,* 692 F.2d 275 (2nd Cir., 1982), aff'd 104 S.Ct. 265 (1983).

FIFTH DEFENSE

1. In the alternative, the court should stay action in this case with respect to the Commerce Clause under the doctrine of abstention since the case presents a question of statutory interpretation of first impression arising under the Connecticut Liquor Control Act which should be resolved in the State Supreme Court, and the resolution of which would obviate this constitutional question.

Respectfully submitted,

BAILEY AND WECHSLER

By /s/ Alfred F. Wechsler

(A Member of the Firm)
One Financial Plaza
Hartford, CT 06103
Tel. No.: (203) 525-9191

By /s/ William A. Wechsler

(A Member of the Firm)
One Financial Plaza
Hartford, CT 06103
Tel. No.: (203) 525-9191

Attorneys for WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC.; JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS, INC.; ALLAN S. GOODMAN, INC.; AND HARTLEY AND PARKER LIMITED., INC.

[Certification of Service omitted in printing]

APPENDIX J

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

Civil Action File No. H 84 816 PCD

MEMORANDUM IN SUPPORT OF DEFENDANTS MOTION FOR SUMMARY JUDGMENT

FEBRUARY 13, 1985

BRIEF SUPPORTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, MOTION FOR STAY

INTRODUCTION

This memorandum is submitted in support of Defendants Motion for Summary Judgment. Defendants are John F. Healy and David L. Snyder, Commissioners of the Connecticut Department of Liquor Control who are charged with the responsibility of enforcing the provision of the Connecticut Liquor Control Act, Connecticut General Statutes Section 30-1 *et seq.*, and Charles W. Kasmer, Secretary of the Connecticut Department of Liquor Control who administers many of the day-to-day affairs of the Department. Intervenor-Defendants are the Wine and Spirit Wholesalers of Connecticut, Inc., an association of companies that sell alcoholic liquor in the State of Connecticut. Plaintiffs are the U.S. Brewers Association, Inc., an association of companies that brew beer in the United States or that import beer for sale in the United States (hereinafter Brewers).

The beer price affirmation provisions of the Liquor Control Act, Connecticut General Statutes Section 30-63a(b),

30-63b(b) and 30-63c(b), were first enacted by the Connecticut General Assembly in 1981 in Public Act 81-294. In 1984, the Connecticut General Assembly amended the beer price affirmation provisions in Public Act 84-332 and Public Act 84-432. The declared purpose and ultimate result of Public Act 84-332 was to conform the beer price affirmation provisions to the Appellate decision in *U.S. Brewers Association v. Healy,* 692 F.2d 275 (2d Cir. 1982), affirmed with no opinion ____ U.S. ____, 104 S. Ct. 265, 78 L.Ed. 2d 248 (1983). The Commissioners of the Department of Liquor Control by affidavit and Declaratory Ruling issued pursuant to Connecticut General Statutes 4-176, have interpreted the beer price affirmation provisions to conform to the Appellate decision in *U.S. Brewers Association v. Healy, supra.* Public Acts 84-332, 84-432 and Connecticut General Statute Section 30-63a(b) were enacted pursuant to the Twenty-first Amendment to the U.S. Constitution.

This immediate action was commenced by Plaintiff's on July 25, 1984 seeking both a Declaratory Ruling and Injunctive Relief against the "beer price affirmation provisions" of Connecticut Public Act 84-332, Public Act 84-432 and Section 30-63a(b) of the Connecticut Liquor Control Act. Defendants moved for Summary Judgment on August 30, 1984 based on the fact that there is no general issue of material fact concerning the constitutionality of Public Act 84-332, Public Act 84-432, and Connecticut General Statutes Section 30-63a(b) as interpreted by the Connecticut Liquor Control Commission, and Defendants alternatively moved for a Motion For Stay, Intervenor-Defendant hereby incorporates by reference the brief of Defendants in support of their motion for Summary Judgment dated August 30, 1984.

THE AMENDED LAW IS CONSTITUTIONAL UNDER THE COMMERCE CLAUSE

Section 30-63b(b), as amended provides that, **at the time of posting,** the price being affirmed "is no higher than the lowest price at which each such item of beer is sold, offered for

sale, shipped, transported or delivered" to wholesalers in the border states. Therefore, the law points to a single moment in time at which Brewers must affirm that the price they are offering to sell their product in Connecticut is no higher than the lowest price in any of the border states. There is no language to suggest that the affirmation has a future tense, or that the affirmation is in any way prospective. The Connecticut statutes removed the words "or will be" and the phrase "at any time during the calendar month covered by such posting" which were part of the pre-existing law. In fact, Section 30-63b(e), which was added by Public Act 84-332, specifically states that "[t]his section shall not prohibit a manufacturer or out-of-state shipper permittee . . . from changing prices to any wholesaler in any other state . . ." The Brewers are free to raise or lower their prices as soon as their price has been posted in Connecticut.

In *Seagram & Sons v. Hostetter,* 384 U.S. 35 (1965) the Supreme Court upheld a New York Posting and Affirmation Statute which required that the monthly price schedules for sales to wholesalers and retailers filed with the State Liquor Authority be accompanied by an affirmation that 'the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in the United States during the preceding month.' *Id.* at 39-40.

In upholding the constitutionality of the New York law, the Court noted that the case concerned liquor "destined for use, distribution, or consumption in the State of New York," *Id.* at 42, and that in that situation "the Twenty-First Amendment **demands wide latitude** for regulation by the State." *Id.* [emphasis added] Continuing, the Court reasoned that New York could "constitutionally insist" that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. *Id.* at 43. Holding for the state, the Court added that the Appellants argument that the statutes would have a discriminatory effect on their businesses outside the state were largely "conjecture" and that '[t]he mere fact that state action may have repercussions beyond state

lines is of no judicial significance so long as the action is not within that domain which the constitution forbids.' *Id.* at 43. The *Seagram* case is directly analogous to the facts presented in the case at bar, and should be controlling.

Each of the three states bordering Connecticut has legislation requiring wholesalers in those states to sell only to retailers in those states. Because of this, there is in fact no direct competition between the wholesalers of each state, since they are prohibited by there own state statutes from selling outside of their states.

Realistically, there is no interstate or regional competition in beer sales due to the nature of the three-tier system established independently by Connecticut and its three border states. Since the Brewers have offered no evidence to support their reasoning as to why prices should be substantially lower in the three border states than in Connecticut, or conversely, why they should be much higher in Connecticut than in the border states, it is reasonable for Connecticut to insure that Connecticut wholesalers and retailers be treated equally by receiving the same prices as their neighbors across state lines. Because the Connecticut law allows Brewers to reflect additional shipping and tax costs in determining the affirmed price, there is no valid reason why Brewers for competitive reasons would have to charge more in Connecticut than in the other three border states.

Connecticut does not seek to dictate the prices at which the Brewers offer their products. Connecticut is simply mandating that its wholesalers be placed on an equal footing with wholesalers in the border states, and that they not be singled out to subsidize lower prices charged by Brewers in these border states. This is similar to the mandate which 17 states with state-run liquor retail operations have given to national liquor distillers and importers, see *Seagram, supra.*

It is fundamental economics if Brewers charge artificially low prices in some markets, they will charge comparably

higher prices in other markets in order to achieve targeted profit margins. Recognizing this market price discrimination, Connecticut has sought only to protect its consumers from being charged prices higher than consumers in other states, so that Connecticut consumers will therefore not be in a position of subsidizing the lower prices being charged to consumers in other states.

Moreover, Connecticut has a legitimate state interest in maximizing sales within its own borders in order to increase its tax revenue. Increasingly state revenue is particularly important in Connecticut, where there is no state income tax, and the State must rely on a sales tax and on such taxes as those imposed on alcohol to fund the state budget. Furthermore, highway safety must be considered a unique factor with regards to traveling across state lines to purchase alcoholic beverages. The state has a legitimate interest in trying to curtail buying patterns that might well lead to an increased danger on the highways.

There are some state activities which have been invalid under the Commerce Clause. In *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), the State of New Jersey attempted to prevent out-of-state shippers from depositing their garbage in New Jersey landfills, while granting New Jersey sources of garbage preferential treatment in being admitted to their landfill sites. In order to adjudge a state law infirm under the Commerce Clause, the Court stated that "[w]hat is crucial is the attempt by one state to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." *Id.* at 628. Connecticut's affirmation law does not **isolate** Connecticut from its border states, but rather insures that the state is treated **in harmony** with those states and that Connecticut is not "isolated" in paying higher prices to subsidize prices charged in the border states. In a similar vein, the Connecticut legislature solely seeks to have its wholesalers, retailers and consumers treated in parity with their counterparts in its neighboring states.

Connecticut's Posting and Affirmation Statutes attempt to protect the economic interests of the Connecticut beer consumer by assuring that the consumer pay a price that is fair and competitive with the prices paid by consumers in the border states. Connecticut's law does not protect in-state industry at the expense of out-of-state industry, because Connecticut has no in-state brewers. Connecticut's legislation treats all Brewers equally, so that no particular Brewer, and no one particular state, is disproportionately affected by these statutes. Connecticut simply places upon all Brewers desiring to sell their products in Connecticut a uniform element of market price competition. If the competition is too stiff, or if profit margins are perceived to be too small, Brewers are free to exercise their business judgment in withdrawing from doing business in the state of Connecticut.

In short, the Commerce Clause does not prohibit a state from enacting reasonable legislation to protect the economic interests of its citizens, even if such legislation incidentally affects interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 624, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In the final analysis, the Court in *Philadelphia v. New Jersey* reasoned that "[t]he principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable

effects." See also *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980).

TWENTY-FIRST AMENDMENT SANCTIONS CONNECTICUT'S POSTING/AFFIRMATION LAWS

The second section of the Twenty-First Amendment provides that, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Twenty-First Amendment makes the sale of liquor in any state a privilege bestowed by the state. A state may completely prohibit the sale and consumption of alcoholic beverages within its borders. Moreover, such a prohibition would not violate the commerce clause. *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 330 (1964). Furthermore, the Court has said that it is well-established that a sate has broad power under the Twenty-First Amendment **"to regulate the times, the places and circumstances under which liquor may be sold,"** [emphasis added] *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599, 2600 (1981), see also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939); *California v. LaRue*, 409 U.S. 109 (1972). Furthermore, as the Supreme Court observed in *Craig v. Boren*, 429 U.S. 190 (1976) "[t]his Court's decision . . . [has] confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Id.* at 206.

Since its adoption, the Twenty First Amendment has remained the governing force in granting states the right to regulate the sale of liquor within their borders. As recently as September 1984, Judge Friendly succinctly stated:

> For some of us who were "present at the creation" of the Twenty First Amendment . . . the Twenty First Amendment was designed to end the "noble experiment" by which the Federal government endeavored to control the drinking habits of all

citizens and to place control of alcoholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the Eighteenth Amendment, which was accomplished by § 1, the Amendment should give the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the Commerce Clause, which had tampered such regulation before the Eighteenth Amendment was adopted. This was accomplished by § 2 of the Twenty First Amendment which provides: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' *Jack R. Battipaglia and Bacchus Selections, Inc. v. New York State Liquor Authority*, No. 1381 dated September 21, 1984.

THE AMENDED LAW IS CONSTITUTIONAL UNDER THE SHERMAN ACT AND SUPREMACY CLAUSE

Count Four of Plaintiff's Complaint, Paragraphs 53 through 56, alleges that Connecticut's beer price affirmation provisions in conjunction with Connecticut's price posting requirement, violate Section 1 of the Sherman Act, 15 U.S.C. 1, and thus contravene the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2.

As outlined in Defendants Brief in Support of their Motion for Summary Judgment, this precise issue was raised and decided adversely to the Plaintiffs in *United States Brewers Association, Inc. v. Healy*, 532 F. Supp. 1312, 1329-30 (D. Conn. 1982), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982). The Second Circuit did not address the Supremacy Clause issue at that time, *Id.* at 278.

Defendants correctly assert that neither the affirmation nor the price posting requirements permanently condone, authorize, require or compel an agreement between or among

two or more private parties. In that § 1 of the Sherman Act is directed only to "contract[s], combination[s], in the form of trust or otherwise, or conspirac[ies] in restraint of trade or commerce", plaintiffs are confronted with the harsh reality that the challenged Connecticut laws do not compel any of the above. No agreement is mandated. Rather, the posting and affirmation schedules required to be filed by the Brewers are individual acts. Any alternative interpretation has already been dismissed by Judge Blumenfeld in *Brewers Ass'n*, at 1329:

> The basic flaw in plaintiffs' argument was pointed out by the court in its ruling on the motion for preliminary injunction "Absent an agreement among private parties, there cannot be a violation of Section One of the Sherman Act, 15 U.S.C. 1.

Notwithstanding further protestations, Judge Blumenfeld astutely concluded:

> It is also clear that the beer price affirmation statute requires only unilateral action by each brewer and importer. It does not require conduct which the antitrust laws forbid, and does not exert "irresistible economic pressure" on the plainatiffs to violate the Sherman Act. It follows that the statute does not implicate the Supremacy Clause, and, therefore plaintiffs' argument must be rejected. *Id.* at 1330. See also, *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981) *aff'g sub nom., Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F. Supp. 936 (D. Conn. 1981)

Judge Blumenfeld's holding was subsequently incorporated by Judge Friendly of the Second Circuit in *Battipaglia, supra.* According to Judge Friendly:

> He [Judge Blumenfeld] correctly distinguished *Midcal* as involving an implicit agreement for resale price

> maintenance and cited *Serlin Wine & Spirits Merchants, Inc. v. Healey*, 512 F. Supp. 936, 938 (D. Conn. 1981), aff'd sub nom. *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2nd Cir. 1981). He [Judge Blumenfeld] then applied our holding in *Modern Home Inst. v. Hartford Accident Indemnity Co.*, 513 F.2d 102, 108–09 (2 Cir. 1975), that § 1 of the Sherman Act is directed only at joint action and does not prohibit independent business actions and decisions. *Id.* ata 6429.

The *Battipaglia* Court found that:

> The [Blumenfeld] position . . . is appealing. Section 1 requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had involuntarily done what they have been compelled to do is simply too 'iffy.' *Id.* at 6431.

Plaintiffs in this action mount a Sherman Act attack on the Connecticut posting/affirmation statutes based upon an analogous "iffy" line of legal reasoning. It should be summarily dismissed.

Moreover, even if plaintiffs could convince the court that they were condoned, authorized, required or compelled to "agree" with one another, this challenge to the Connecticut posting /affirmation law statutes would fail. These statutes do not, individually nor collectively require the establishment of "minimum sale prices" for calendar month periods.[1] The posting element of the law solely requires that posted prices in Connecticut be maintained for 30 days.[2] The affirmation element to the law (as interpreted by the Department of Liquor Control), only contains affirmation as to a particular moment in time, e.g. 10:00 a.m. on the sixth of each month.[3]

Connecticut's law in no way mandates any action by out-of-state shippers. It is directed only at those Brewers who **choose** to do business in the state of Connecticut.[4]

Furthermore, should the brewers/importers have difficulties with the Massachusetts price law, they may resort to an appropriate Massachusetts court of competent jurisdiction. The suggestion that a symbiosis of Connecticut and Massachusetts liquor regulation law contravenes the Sherman Act tests the boundaries of even the most vivid imagination.[5]

Equally untenabale is plaintiffs' notion that Connecticut's posting/affirmation requirements, if engaged in by any such group of out-of-state shippers otherwise than under mandate of law, would violate Section 1 of the Sherman Act, 15 U.S.C. § 1. This argument was also rejected in *Battipaglia, supra.* See also, *Rice v. Norman William Co.*, 458 U.S. 654 (1982) in which the Court stated that:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places **irresistable pressure** [emphasis added] on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed by the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws. *Id.* at 661.

The *Battipaglia* decision irrevocably refutes plaintiff's contentions concerning any antitrust violations in this case:

> Application of the *Norman Williams* standard calls for affirmance here even if we were to accept arguendo the contention that an exchange of price information and price adherence compelled by a state are to be treated, for the purpose of antitrust preemption analysis, as if they were voluntary. The Supreme Court has never held that the exchange of price information, in the language of *Norman Williams*, "necessarily constitutes a violation of the antitrust laws in all cases." Until *United States v. Container Corp.*, 393 U.S. 333 (1969), "[a] program to exchange price information was illegal only if, in addition to the agreement to exchange information, the defendants agreed to fix prices. *Id.* at 6434.

Even the *Container Corp.* decision was severely limited in application in that the Court observed that the industry in question was "dominated by relatively few sellers, that [the] product is fungible and the competition for sales is price," and that "[t]he demand is inelastic, as buyers place orders for immediate, short term needs," *Id.* at 334.

In his concurring opinion in *Container Corp.*, Justice Fortas observed that the Court did not "hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to material arrangement, is a per se violation of the Sherman Act," 393 U.S. at 338-39. This has been subsequently cited by the Court to say that "the dissemination of price information is not itself a per se violation of the Sherman Act." *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975).

As was the case in *Battipaglia* at 6436, Connecticut's posting/affirmation laws do not mandate or authorize conduct "that necessarily constitutes a violation of the antitrust laws in all cases." Brewers can fulfill all of their obligations

under the statute without either conspiring to fix prices or engaging in "conscious parallel" pricing.

The Connecticut laws, like the New York laws in *Battipaglia, Id.*, do not place "irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. Instead, they simply require that, having announced a price independently chosen by the Brewer, the Brewer shall maintain it for a month, and that on the 6th of each month at 10:00 a.m., the Brewer shall affirm that "the bottle, can or case price, or price per keg, barrel, or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state."[6]

In short, Plaintiffs contention that Connecticut's beer price affirmation provisions, in conjunction with Connecticut's price posting requirement, violates Section 1 of the Sherman Act and thus contravenes the Supremacy Clause of the Constitution of the United States, is groundless. There are simply no genuine issues of material fact concerning the constitutionality of Connecticut's posting/affirmation statutes. Defendants Motion for Summary Judgment of August 30, 1984 should be granted.

CONCLUSION

For all the foregoing reasons, Intervenor-Defendants urge this court to render Summary Judgment for the Defendants. In the alternative, we seek Summary Judgment for the Defendants on the Sherman Act/Supremacy Clause issue and urge the court to stay action on the Commerce Clause issue until the Connecticut Supreme Court renders judgment on the correct interpretation of statute involved, which would obviate this constitutional issue.

Respectfully submitted,

Intervenor/Defendant: Wine and Spirit Wholesalers of Connecticut, Inc.

By /s/ Alfred F. Wechsler

Alfred F. Wechsler, Its Attorney
Bailey and Wechsler
One Financial Plaza
Hartford, CT 06103
Tel.No.: (203) 525-9191

By /s/ William A. Wechsler

William A. Wechsler

By /s/ Kevin O'Leary

Kevin D. O'Leary

FOOTNOTES

[1] See Plaintiffs July 25, 1984 *Complaint for Declaratory and Injunctive Relief*, Count IV, Paragraph 53 at page 19.

[2] *Id.* Paragraph 53 distorts the statute. Connecticut posting law sets no minimum, nor for that matter, maximum price. The establishment of price is left to the Brewers.

[3] See Declaratory Ruling of the Department of Liquor Control entitled *Affidavit*, dated August 30, 1984, and attached hereto.

[4] In Paragraph 55 of their *Complaint*, Brewers refer to Massachusetts law; Massachusetts posting law is of no relevance to this case.

[5] See Paragraph 55 of the *Complaint*.

[6] Connecticut General Statute Section 30-63b(b); *see also* "Beer Affirmation Form" attached hereto. Moreover, even assuming arguendo that the purpose of the Connecticut statute was to discourage the competition, the federal antitrust laws do not prohibit a state "as sovereign" from imposing certain anti-competitive restraints "as an act of government" in order to effectuate an orderly market. (See *Parker v. Brown*, 317 U.S. 341, 352 63 S. Ct. 307, 314, 87 L.Ed. 315), see also *Bestway Beer and Soda Distributors, Inc. v. New York State Liquor Authority*, 99 A.D. 2d 727, 472 N.Y.S. 2d 350 (1984) (relating to New York statute prohibiting increase in price of beer sold to resale licensees within 180 days after last price decrease on such beer).

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APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

Civ. Action File No. H 84 816 (PCD)

February 13, 1985

MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the plaintiffs, United States Brewers Association, Inc., et al., respectfully move this Court to enter summary judgment in their favor because 1) there is no genuine issue as to any material fact; and 2) it is entitled to judgment as a matter of law.

UNITED STATES BREWERS
ASSOCIATION, INC., et al.
Plaintiffs

By /s/ Lynn Anne Glover

J. Charles Mokriski
Lynn Anne Glover
Day, Berry & Howard
CityPlace
Hartford, CT 06103-3499
(203) 275-0100

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APPENDIX L

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

No. H84 816 PCD

Rule 9(c) Statement of Plaintiffs In Support of Their Cross-Motion for Summary Judgment

Pursuant to Rule 9(c) of the Local Rules of the United States District Court for the District of Connecticut, Plaintiffs state that there is no genuine issue to be tried with respect to the following material facts concerning Plaintiffs' claims that the Connecticut beer price affirmation provisions are unconstitutional.

1. Plaintiffs do not dispute the facts set forth in Defendants' Statement of Material Facts Not In Dispute made pursuant to Local Rule 9(c) (hereinafter, "Defendants' 9(c) Statement").

The Parties

2. Plaintiffs consist of the USBA (an industry association of 39 domestic brewers and 23 importers of which six such brewers sell beer to Connecticut wholesalers), four domestic brewers, and seven importers. (Complaint at ¶ 8; Defendants' 9(c) Statement at ¶ 1)

3. Each Plaintiff offers its product for sale in Connecticut to Connecticut wholesalers. (Complaint at ¶ 8; Defendants' 9(c) Statement at ¶ 2)

4. None of the Plaintiffs owns or operates a brewery in Connecticut. (Complaint at ¶ 20)

5. There are no breweries in Connecticut. (*Id.; United States Brewers Ass'n, Inc. v. Healy*, 532 F. Supp. 1312, 1317 (D. Conn. 1982) (hereinafter, "*Healy I*"))

6. Defendants John F. Healy and David L. Snyder are the existing commissioners of the Connecticut Department of Liquor Control. (Defendants' 9(c) Statement at ¶ 3; Affidavit of John F. Healy and David L. Snyder dated August 30, 1984 (hereinafter, "Declaratory Ruling") at ¶ 2)

7. Defendant Charles Kasmer is the Secretary of the Department of Liquor Control. (Defendants' 9(c) Statement at ¶ 3; Complaint at ¶ 23)

8. Defendants Healy, Snyder and Kasmer are vested with the authority and power to enforce the Connecticut Liquor Control Act, including the beer price affirmation provisions. (Declaratory Ruling at ¶ 3; Defendants' Rule 9(c) Statement at ¶ 3)

9. Intervenor-defendant Wine & Spirits Wholesalers of Connecticut, Inc. is a trade association consisting of seven members who sell alcoholic beverages at wholesale within the State of Connecticut. (Intervenor-Defendant's Answer to Interrogatories at 1).

Beer Marketing in Connecticut and the Border States

10. The beer industry in the four-state region of Connecticut and the Border States is broadly divided into three marketing levels: (i) the brewers and importers which in Connecticut are referred to as out-of-state shippers; (ii) the wholesalers which generally purchase beer from more than one brewer or importer; and (iii) the retailer which sells the beer to the ultimate consumer either for on-premises (bars, taverns, restaurants) or off-premises (package stores, grocery stores, etc.) consumption. (Complaint at ¶ 24; *Healy I* at 1319)

11. Domestic brewers generally offer their beer to wholesalers f.o.b. the brewery (that is, the price is based upon the delivery to and acceptance by the wholesaler at the brewery), and importers sell their products c.i.f. the port of entry (that is, based on delivery to and acceptance by the wholesaler at the port), although some importers do maintain warehouses and offer their products f.o.b. the warehouse.

12. The beer market in New York, Rhode Island and Massachusetts ("the Border States") is characterized by a great deal of price flexibility, variability and competition. (*Healy I* at 1320)

13. Due to less state regulation in certain Border States retail prices tend to be lower in those states than retail prices for the same products in Connecticut. (*Id.*)

14. Connecticut retailers by law, may purchase their beer only from one designated Connecticut wholesaler for each particular brand of beer. (Conn. Dep't. Liquor Control Reg. 30-6-B7)

15. New York has no legal division of wholesaler territories.

16. Connecticut law mandates that every retailer within a wholesaler's territory be offered the same price for each product regardless of volume sold or competitive conditions confronted by the wholesaler. (Conn. Liquor Control Act § 30-63(b))

17. New York and Rhode Island permit competitive differentiation among wholesalers in price and terms. (*Healy I*, at 1319-20)

18. Connecticut law prohibits price discounts or inducements of any kind to be offered to wholesalers whereas such discounts and inducements are available in each of the Border States. (Conn. Gen. Stat. Ann. § 30-63(b) (West Supp. 1984); *Healy I* at 1319-20)

19. Connecticut restrains the ability of brewers and importers to offer price promotions including barring discounts, requiring price changes to remain in effect for at least one month with respect to wholesale purchases, requiring uniform prices on all bottles and cans of the same size, however packaged, and requiring the brewer to absorb the majority of the costs of the promotion. (Conn. Gen. Stat. Ann. §§ 30-63(b) and (c) (West Supp. 1984); *id.* § 30-63c; *Healy I* at 1319)

20. The retail price of a particular brand of beer is very often lower across the border in the Border States than it is in the border areas of Connecticut. (*Healy I* at 1320)

21. Connecticut consumers living in these border areas historically have crossed state lines and purchased beer, either for on-premises or off-premises consumption in the Border States. (*Id.*)

Dated: Hartford, Connecticut
July , 1984

DAY, BERRY & HOWARD

By _____
(A Member of the Firm)
City Place
Hartford, Connecticut 0613-3499
(203) 275-0100
Attorneys for P ıintiffs

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
Attorneys for Plaintiff
Anheuser-Busch, Inc.

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorneys for Plaintiff
Miller Brewing Co.

COVINGTON & BURLING
1201 Pennsylvania, N.W.
Washington, D.C. 20044
Attorneys for Plaintiffs
United States Brewers
Association, Inc.,
G. Heilman Brewing Company,
The Genesee Brewing
Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing Company,
Inc.,
Monterey Bay Company, Inc., and
Van Munching Company, Inc.

GARY NATEMAN, ESQ.
United States Brewers
Association, Inc.
1750 K. Street, N.W.
Washington, D.C. 20006
Attorney for Plaintiff
United States Brewers
Association, Inc.

APPENDIX M

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

No. H 84 816 PCD

MARCH 6, 1985

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Concurrent with the Defendants' Declaratory Ruling and the filing of Plaintiff's pleadings in this matter, the issues presented by this case have been substantially narrowed. In our view, it is clear that two erstwhile issues have been totally abandoned, i.e., any claim that the new Connecticut law has an impermissible extraterritorial thrust, and, those claims based upon the Supremacy Clause:

> As modified by the defendants' Declaratory Ruling, plaintiffs concede that on their face the new beer price affirmation provisions technically comply with *Healy I*. Furthermore, plaintiffs concede that the Declaratory Ruling technically renders the affirmation law facially valid under the Supremacy Clause. Accordingly, plaintiffs would consent to a dismissal of their claim based upon extraterritorial price regulation under *Healy I* and their Supremacy Clause claims specifically conditioned upon the interpretation and operation of the new law reflected in the defendants' Declaratory Ruling.

Plaintiff's Memorandum of Law at p. 18.

Thus, this case, in its present posture, is a virtual mirror replica of the controversy which was so ably analyzed by the District Court in 1982. *U.S. Brewers Assoc., Inc. v. Healy*, 532 F.Supp. 1312 (D. Conn. 1982). There, Judge Blumenfeld painstakingly addressed each issue which the Brewers presented. This litigation constitutes no more than a representation of those very same issues. In the interests of brevity and because the analysis contained therein so precisely relates to the issues of the instant controversy, we earnestly commend Judge Blumenfeld's product to this Court.

As we are all aware, the Court of Appeals ultimately reversed the District Court judgment, based upon a finding that the predecessor Connecticut affirmation law had the impermissible effect of establishing and ". . . controlling the minimum prices at which liquor may be sold outside of its own territory . . ." *U.S. Brewers Assoc., Inc. v. Healy*, 692 F.2d 275, 284 (2nd Cir. 1982). While this decision did not specifically affirm Judge Blumenfeld's articulations regarding the "all-out attack on the Connecticut beer price affirmation provisions under the Commerce Clause . . .", Ibid at 281, we submit that any fair reading of that case (with particular emphasis on pages 281-2 and footnotes thereon) must result in the conclusion that the Court of Appeals concurred with the lower court's treatment of the Commerce Clause issues, save for the "extraterritorial thrust". Hence, the Court, possibly anticipating the very Connecticut legislative amendments to the affirmation law which are presently under attack, held:

> Given the latitude allowed a state under the Twenty-first Amendment to regulate the sale of liquor within its own borders, the holding in *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states, see 384 U.S. at 43-45, 86 S.Ct. at 1260-1261, leaving those out-of-state prices unregulated by Connecticut.
>
> *U.S. Brewers Assoc., Inc. v. Healy*, 692 F.2d 275, 283-4 (2nd Cir. 1982), aff'd. 104 S.Ct. 265 (1983).

The present Connecticut system of affirmation, as the Defendant Department has clearly indicated in its Declaratory Ruling, constitutes no more than "a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states. . . ."

While we remain convinced that the District Court's ruling fully addresses and disposes of all claims he ein presented by the Brewers, we respond to the allegation that certain "new cases" support the tired claim of the Brewers that Connecticut's new law amounts to the forbidden economic protectionism and/or constitutes an undue burden.

New England Power Company v. New Hampshire, 455 U.S. 331 (1982) concerned the attempt by the State of New Hampshire to preclude the exportation of privately produced, hydroelectric energy, New Hampshire, in effect, ordered that the "cheaper" electricity first be distributed to its citizens before it was made available for purchase by other states' citizens. The Supreme Court rejected New Hampshire's arguments that this conduct was expressly permitted by federal law (Sec. 201(b), Federal Power Act). Thus, the state conduct was expressly permitted by federal law (Sec. 201(b), Federal Power Act). Thus, the state conduct was to be measured against the traditional negative implications of the Commerce Clause. In this posture, the conclusion was both obvious and inevitable:

> Our cases consistently have held that the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, *precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within it borders or to the products derived therefrom.* E.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911). Only recently, in *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978), we reiterated that "[t]hese cases stand for the

> the basic principle that a 'State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State.' " (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928).)
>
> *New England Power Co.*, supra at 338 (emphasis added)

A unanimous Supreme Court annnounced no new concepts in this case but merely again condemned "economic protectionism", noting that the New Hampshire scheme violated nearly all of the Commerce Clause prohibitions. Connecticut here does not grant a "preferred right of access" for its citizens to domestically produced beer but simply seeks, in the words of the District Court, "to secure 'fairer' or 'more equal' competition [which] can hardly be characterized as 'protectionist' within the meaning of the Commerce Clause". *U.S. Brewers Ass'n. Inc. v. Healy*, 532 F.Supp. 1312, 1323 (1982).

Most recently, *Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049 (1984) served as the vehicle for the Supreme Court to derail the efforts of Hawaii to legislatively "protect" a developing domestic liquor industry. Here, an exemption from a state excise tax, imposed on all other (domestic and non-domestic) liquors, was provided for two, locally produced, alcoholic beverages. As a result of this tax then, the price of these two beverages was lower than all others. Hawaii did not dispute (indeed, it asserted) that the purpose of the law was to encourage and promote the establishment of a new local industry. Since a more vivid example of "economic protectionism" can hardly be imagined, the Court's conclusion is not surprising:

> We therefore conclude that the Hawaii-Liquor Tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products.
>
> *Bacchus Imports, LTD v. Dias*, 104 S.Ct. 3049, 3058 (1984)

The Court further found that the Hawaiian scheme was not insulated from Commerce Clause strictures by Twenty-First Amendment powers, holding:

> The central purpose of the [21st Amend] was *not* to empower States to *favor local liquor* industries by erecting barriers to competition."

Id. at p. 3059 (emphasis added)

Bacchus serves to highlight the distinction which separates the Connecticut beer affirmation system from those schemes found to be constitutionally impermissible. Namely, there is no domestic beer product which Connecticut law seeks to protect. Connecticut has no beer manufacturers and thus there exists no entity to be protected.

It will not be lost upon this court, we are confident, that the Plaintiffs in the *Bacchus* case were the wholesalers who were *obligated* to pay the challenged tax. On that basis, the Supreme Court found that Plaintiffs had standing to maintain the lawsuit. Notably absent in the instant litigation are any out-of-state wholesalers or retailers whose ostensible rights the Brewers repeatedly try to assert. It is both reasonable and significant to recognize this absence and wonder why, if these individuals are so greatly effected, they are not present, seeking relief from the court.

One further case merits our attention: *U.S. Brewers Ass'n. Inc. v. Dir. Dept. of A.B.C.*, 100 N.M. 216, 668 P.2d 1093 (1983). In this case the New Mexico Supreme Court determined that the New Mexico beer affirmation system did not constitute an impermissible burden on interstate commerce, relying exp[illegible]ly upon *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.[illegible] (1966):

> A comp[illegible] of New York's Section 9 and the Act indicates [illegible] indistinguishable price affirmation setting. Both [illegible]quire wholesalers and retailers to file

> monthly price schedules with the respective state liquor authority accompanied by an affirmation that prices charged are no higher than the lowest price at which sales are made anywhere in the United States during the preceding month.
>
> *U.S. Brewers Ass'n v. Dir. Dept. of A.B.C.*, 668 P.2d 1093, 1097 (1983)

Quite obviously, this affirmation system, as described by the New Mexico Supreme Court, nearly duplicates the Connecticut system here under attack. Significantly, it could be argued that the New Mexico plan is "more burdensome", since it calls for the lowest price "*anywhere* in the United States during the preceding month" and not simply three contiguous states. Nonetheless, the United States Supreme Court dismissed an attempted appeal for want of a substantial federal question. *U.S. Brewers Ass'n Inc. v. Rodriquez*, 104 S.Ct. 1581, 80 L.Ed.2d 115 (1984). Justice Stevens, in a concurring opinion, and obviously reacting to the Brewers assertion that the Supreme Court's summary affirmance of the Court of Appeals decision in *U.S. Brewers Ass'n. Inc. v. Healy*, supra, demanded a different result, aptly observed:

> Our recent decision in *Healy*, invalidating a Connecticut price affirmation statute, does not undermine the New Mexico Supreme Court's reliance on *Joseph E. Seagram & Sons, Inc. v. Hostetter* and *Rice v. Norman Williams Co.* in upholding the constitutionality of the 1967 New Mexico Act as amended in 1979.
>
> *U.S. Brewers Ass'n Inc. v. Rodriquez*, 80 L.Ed.2d 115, 116.

Thus it seems quite apparent that *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35 (1965) not only continues to be a sound recitation of the appropriate method to harmonize the command of the Commerce Clause with the grant of

authority of the Twenty-First Amendment, but that its teachings were not abrogated by *Healy*, supra. See also, *Bacchus*, supra, dissenting opinion of Stevens, at p. 3063, n. 10.

The parameters of this case, as with any other litigation, are defined by the allegations of the complaint. Fairly read, and in a light most favorable to the Plaintiffs, we submit that, despite assertions to the contrary, this case consists only of a facial attack upon the Connecticut law. The court will search in vain for any specific factual allegations which, if proven, could result in a conclusion that these general statutes, as applied, violate constitutional principles. We ask this court to reject Plaintiffs request that it serve as the legendary "Sword of Damocles" hanging over the Connecticut law. Obviously Plaintiffs are never foreclosed from initiating an action at any time when they can allege and prove that the implementation of this or any other Connecticut statute operates unconstitutionally.

In the face of Judge Blumenfeld's clear holding that the purpose of the Connecticut affirmation law was to secure only equal competition for Connecticut wholesalers, and *not* to discriminate against out-of-state business, *U.S. Brewers Ass'n, Inc. v. Healy*, 532 F.Supp. 1312, 1323 (1982), the Plaintiffs have virtually innundated this court with legislative history, (much of it relating to the predecessor 1981 legislation) seizing upon isolated comments of legislators and alleging an improper purpose. We would ask the court to be mindful of that legislation which is before it. It is virtually the same affirmation system as was contained in the prior Connecticut law except that, as the Plaintiffs themselves admit, the new provisions "were enacted as mere technical amendments to the former price affirmation law in order to attempt to comply with Healy I, . . ." Plaintiffs' Memorandum of Law, p. 14. The Plaintiffs cannot now be permitted to relitigate the purpose of the 1981 Connecticut affirmation law. That purpose has been found by the District Court and recognized by the Court of Appeals:

The district court found it undisputed that the purpose of these provisions was to lower the retail price of beer in Connecticut, thereby increasing the purchase of beer by Connecticut residents within the state and generating increased tax revenues for the state. 532 F.Supp. at 1316 17.

U.S. Brewers Ass'n Inc. v. Healy, 692 F.2d 275, 276 (1982)

Since the "new" provisions are simply "technical amendments" admittedly aimed only at correcting the constitutional infirmity perceived by the Court of Appeals, then such amendments cannot be viewed as substantially altering the purpose of the Act in general.

CONCLUSION

Based upon all of the pleadings and memoranda of the parties, we request that Plaintiffs' Motion for Summary Judgment be denied and Defendants' Motion for Summary Judgment be granted.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

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APPENDIX N

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H 84 816 PCD

MARCH 6, 1985

RESPONSE TO PLAINTIFFS' 9(c) STATEMENT

The Defendants, John F. Healy, et al., earlier filed their 9(c) Statement of Facts not in Dispute in connection with their Motion for Summary Judgment. None of the facts cited therein are disputed by Plaintiffs and the Defendants reaffirm these facts in response to Plaintiffs Cross-Motion for Summary Judgment.

With respect to the statement of facts recited by Plaintiffs, the Defendants accept such statements except as clarified hereunder:

1. Paragraph 12 of Plaintiffs' statement reads: "The beer market in New York, Rhode Island and Massachusetts (The Border States') is characterized by a great deal of price flexibility, variability and competition. (*Healy I* at 1320)". This is not an accurate paraphrase of the finding of the U.S. District Court in *Healy I*. The court found:

> At present, the brewers' pricing policies in New York and Rhode Island are characterized by a good deal of flexibility and variability. The New York City market is the most highly competitive, and accordingly, prices are often the lowest in the four-state region.

United States Brewers Ass'n Inc. v. Healy, 532 F.Supp. 1312, 1320 (D. Conn., 1982) rev'd. 692 F.2d 275 (2nd Cir., 1982) aff'd ____ U.S. ____, 104 S.Ct. 265, 78 L.Ed.2d 248 (1983)

Although we correct Plaintiffs' statement, we submit that this correction does not concern a material fact barring resolution of the case on the motions pending.

2. Paragraph 13 of Plaintiffs' statement reads: "Due to less state regulation in certain Border States retail prices tend to be lower in those states than retail prices for the same products in Connecticut. (*Id.*)" This is not an accurate paraphrase of the finding of the U.S. District Court in *Healy I*. The court found:

> Prices charged by brewers and importers to Connecticut wholesalers are neither the highest nor the lowest in the four-state area. Retail prices in Connecticut, however, are generally higher than those in the bordering states.
>
> *Healy*, supra at 1320

Although we correct Plaintiffs' statement, we submit that this correction does not concern a material fact barring resolution of the case on the motions pending.

3. Paragraph 14 of Plaintiffs' statement reads: "Connecticut retailers by law, may purchase their beer only from one designated Connecticut wholesaler for each particular brand of beer. (Conn. Dep't. of Liquor Control Reg. 30-6-B7)." This is not an accurate interpretation of the law. Regulation 30-6-B7 provides, in pertinent part, as follows:

> Each manufacturer and out-of-state shipper permittee shall file with the department a list of his authorized distributors, setting forth the brands and also

> the exact geographical area in which the distributor or wholesaler shall be authorized to sell, and shall also file a certificate from the wholesaler to the effect that he is, in fact, servicing the area designated and no other area for the brand or brands for which he has been appointed as distributor.
>
> Sec. 30-6-B7, Regulations of Connecticut State Agencies.

Under this section, a wholesaler may only sell to a retailer within the wholesaler's territory. The boundaries of the territory and the number of wholesalers appointed to service that territory are established at the choice of the out-of-state shipper. Public Act 84-432 provides that subsequent, additional beer wholesalers may be appointed for just and sufficient cause. Although we correct Plaintiffs' statement, we submit that this correction does not concern a material fact barring resolution of the case on the motions pending.

4. Paragraph 18 of Plaintiffs' statement reads: "Connecticut law prohibits price discounts or inducements of any kind to be offered to wholesalers whereas such discounts and inducements are available in each of the Border States. (Conn. Gen. Stat. Ann. Sec. 30-63(b) (West Supp. 1984); *Healy I* at 1319-20)". This is not an accurate paraphrase of the finding of the U.S. District Court in *Healy I*. The court found:

> All four states require licenses for those who market beer at each of the three levels involved; brewers, distributors and retailers. The net effect of this scheme is to entirely preclude sales by wholesalers in one state to retailers in another. At this point the uniformity ends. Massachusetts is similar to Connecticut in that it does have a price posting requirement applicable to brewers and importers, although there is no requirement that the posted price be equal to the lowest price charged for the same item in some other place. Massachusetts, like Connecticut, also

prohibits brewers or wholesalers from differentiating among their customers in respect of price or other items of trade, prohibits sales below cost by brewers, importers, and wholesalers, and requires that consumer resale price schedules be filed, although compliance by retailers is not mandatory in either state. At least, Massachusetts, like Connecticut, has recently passed a bottle bill which will require that cans and bottles be redeemable.

In New York and Rhode Island brewers and importers, unfettered by extensive regulation, can and do offer a range of price discounts to wholesalers for a variety of reasons. Discounts are offered for quantity sales, sales to special customers (the so-called home distributors in New York), to encourage advertising by wholesalers, for purposes of test marketing new products, and for promotional purposes.

Healy, supra, at 1319

Although we correct Plaintiffs' statement, we submit that this correction does not concern a material fact barring resolution of the case on the motions pending.

Respectfully submitted,

THE DEFENDANTS
JOHN F. HEALY, ET AL.

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

BY /s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

BY /s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
555 Russell Road
P.O. Box 11424
Newington, Conn. 06111
Tel: 566-7570

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APPENDIX O

CONNECTICUT DEPARTMENT OF LIQUOR CONTROL REGULATIONS SECTIONS 30-6-B4–B12

Sec. 30-6-B4. Out-of-state shipper price lists to be filed

(a) Every out-of-state shipper permittee shall, annually on or before the **sixth** day of January, file with the **department** of liquor control, on forms prescribed by the **department**, one copy of a complete schedule, with each page of such schedule numbered in numerical order, duly verified by the permittee and attested to by the backer, if an individual, or if the backer is a corporation, by an officer of such corporation, of all alcoholic liquors offered for sale in Connecticut, which shall contain with respect to each item: (1) The type of beverage and brand name; (2) the size of the container; (3) the age or per cent and type of neutral spirits; (4) the proof; (5) the number of bottles per case; (6) the bottle and case price. The following information shall be submitted by out-of-state shipper beer only permittees: (1) The type of beverage; (2) the size of the container (barrel, half-barrel, quarter-barrel); (3) the number and size of botles per case; (4) the container price and case price. At the same time that these schedules are mailed to the department, a copy shall be forwarded to each wholesaler licensed by the department to distribute those products for which the schedule is intended.

(b) Except in the case of still wines and sparkling wines, the case price shall be individual for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item contained in the multiple package, the unit price, and the case price. The bottle price posted in such multiple package case must be the same as the bottle price posted in a case containing the one type and brand of wine. The price set forth therein shall become effective on the first day of the

calendar month following the effective filing date thereof and, unless withdrawn or amended, shall be considered refiled and effective each month until the filing date of the next complete schedule. All items shall be bona fide offering of the items set forth in the list. Price changes and prices on new items may be filed on supplemental price schedules, which schedules shall be filed on the **sixth** day of any intervening month, and prices on such supplemental schedules shall become effective on the first day of the month following the effective filing date thereof. When filing supplemental price lists showing amended prices, one copy of the whole numbered page on which the original prices appeared shall be filed. **One copy of such supplemental price list shall be filed, with a copy to the wholesaler licensed to distribute the product.**

(c) Except in cases where an obvious typographical error has been made, no changes, corrections or additions will be considered after the effective filing date. The effective price on any item shall be the price posted on the latest schedule on file on which that particular item appears.

(d) No out-of-state shipper may ship, transport, sell or offer for sale in Connecticut any brand of alcoholic liquor which does not appear on his price schedule.

(e) A violation of any of the provisions of this section shall be punishable by suspension or revocation.

(Effective January 11, 1984)

Sec. 30-6-B4a. Time of posting

(a) Price schedules filed on or before the sixth day of January pursuant to Section 30-6-B4 (a) shall be deemed posted on the sixth day of January at 10:00 a.m. Eastern Standard Time. If the sixth day of January is a Saturday, Sunday or

legal holiday, price schedules shall be filed on the next business day and shall be deemed posted on such next business day at 10:00 a.m. Eastern Standard Time.

(b) In accordance with Section 30-6-B4(b), such price schedule shall be deemed re-posted, unless a timely supplemental price schedule is filed, on the sixth day of each succeeding month at 10:00 a.m. Eastern Standard Time. If the sixth day of any succeeding month is a Saturday, Sunday or legal holiday, the price schedule shall be deemed reposted at 10:00 a.m. Eastern Standard Time on the next business day.

(c) Supplemental price schedules filed on the sixth day of any month shall be deemed posted at 10:00 a.m. Eastern Standard Time on that day and re-posted on the sixth day of each succeeding month at 10:00 a.m. Eastern Standard Time. If the sixth day of any month is a Saturday, Sunday or legal holiday, such supplemental price schedule shall be filed on the next business day, and shall be deemed posted or reposted, as the case may be, at 10:00 a.m. Eastern Standard Time, on such day.

(d) Any price schedule or supplemental price schedule filed late shall be ineffective for that month and shall be applicable for the next filing deadline. Any price schedule or supplemental price schedule filed early shall be applicable for the pending filing deadline.

Effective October 21, 1985)

Sec. 30-6-B5. Records of salesmen's expenses, allowances, bonuses, etc.

Every out-of-state shipper permittee shall be required to keep a record, either weekly or monthly, of all salaries, wages, expenses, allowances, bonuses, cash disbursements and gratuities, either in the form of cash or things of value, paid to any of his employees, agents or salesmen representing him in the state of Connecticut. Such records shall be available for inspection by the agents of the commission at all times during business hours.

Sec. 30-6-B6. Copy of home state license to accompany application

Every application for an out-of-state shipper's permit shall be accompanied by a photostatic copy or by other documentary evidence of a permit or license issued by the state in which the applicant derives authority to manufacture, sell or distribute alcoholic liquors.

Sec. 30-6-B7. Consignments; return of goods; authorized distributors

No out-of-state shipper permittee shall sell alcoholic liquors on consignment. No manufacturer, wholesaler or out-of-state shipper permittee shall take back any merchandise once sold, billed, shipped, delivered or received by any permittee unless such transaction has been approved by the **department**. A full and complete explanation of all circumstances shall accompany any request to take back merchandise. Each manufacturer and out-of-state shipper permittee shall file with the **department** a list of his authorized distributors, setting forth the brands and also the exact geographical area in which the distributor or wholesaler shall be authorized to sell, and shall also file a certificate from the wholesaler to the effect that he is, in fact, servicing the area designated and no other area for the brand or brands for which he has been appointed as distributor. Where a wholesaler has held a distributorship for less than **six** months, no change on the list of authorized distributors or wholesalers of a manufacturer or out-of-state shipper shall be made except after ninety days' notice by registered mail to all such authorized distributors or wholesalers affected by such change which appear on the list of the particular manufacturer or out-of-state shipper as recorded in the office of the **department** of liquor control, and except after ninety days' like notice to and approval by the **department**. Such changes may be made without waiting the ninety days with the approval of the **department** where waivers are executed by the distributors or wholesalers

concerned, or where the geographical area of distribution has not been already allocated to a distributor or wholesaler, or after a hearing has been held, upon presentation of sufficient evidence of any violation of the liquor control act or regulations of the **department**, or evidence of any other act detrimental to the orderly conduct of the business, in which a present authorized distributor or wholesaler has been involved. The notice of change shall indicate that the name of the permittee is to be an additional distributor or wholesaler or, in the case of eliminating the name of a present distributor or wholesaler, with or without substituting another permittee's name, the notice of the change shall so indicate an "elimination" or "substitution." Geographical areas of distribution shall be submitted either by townships or counties or statewide, and any change in geographical area of distribution shall fully conform to the same essential conditions as required in the notice of change to distributors or wholesalers.

(Effective January 11, 1984)

B

Manufacturer and Wholesaler Permits

Sec. 30-6-B8. Records of purchases

Every holder of a manufacturer or wholesaler permit shall maintain a complete monthly record of all purchases made and shipments received by him of all alcoholic liquors, which shall include the number of cases, with inclusive serial numbers, from whom received, the type and brand name, the price and the date of delivery thereof. Such records shall be maintained at all times on the permit premises and be made available to the commission or its agents upon request. Any refusal of a permittee or his duly authorized agent to permit examination of the records, upon request, by an agent of the commission shall be construed as a violation of this section. These provisions become important under the law regulating credit. The commission shall hold permittees strictly accountable for such records.

Sec. 30-6-B9. Restriction of sales

No alcoholic liquor shall be sold or delivered by any wholesaler or manufacturer permittee except from his permit premises.

(Effective August 28, 1984)

Sec. 30-6-B10. Sales of alcoholic liquors, other than alcohol and wine for industrial purposes, to nonpermittees

Every wholesaler permittee shall submit to the commission, in duplicate, within five days of the date of delivery, an invoice of all alcoholic liquors, other than alcohol and wine to be used for the purposes specified in section 30-77 of the general statutes, sold to nonpermittees for industrial purposes. Such invoice shall disclose the name of the seller, the name of the purchaser, the date of sale and the quantity and type of alcoholic liquor. Such wholesaler permittee shall keep, upon the permit premises, a separate account of all such transactions available for investigation by the commission and its agents.

Sec. 3[illegible]-B11.

Repealed, May 3, 1966.

Sec. 30-6-B12. Manufacturer and wholesaler price lists to be filed

(a) Each manufacturer and wholesaler permittee shall, annually, on or before the **twelfth** day of December, file with the **department** of liquor control on forms prescribed by the **department** one copy of a complete schedule, with each page of such schedule numbered and in numerical order, duly verified by the permittee and attested by the backer if an

individual or, if the backer is a corporation, by an officer of such corporation, of all alcoholic liquors offered for sale in Connecticut. These lists shall contain with respect to each item: (1) The type of beverage and brand name; (2) the size of the container; (3) the age or per cent and type of neutral spirits; (4) the proof; (5) the number of bottles per case; (6) the bottle price and case price which shall include all customs, duties, federal taxes, state taxes and cost of delivery to the permittee. If a manufacturer or wholesaler sells to another manufacturer or wholesaler, the prices shall be submitted on a separate schedule; (7) the name of the publication or publications the prices will appear in. If not published, the affidavit required by subsection (g) shall be submitted. The following information shall be submitted only by manufacturer and wholesaler beer permittees: (1) The type of beverage; (2) the size of the container (barrel, half-barrel, quarter-barrel); (3) the number and size of bottles per case; (4) the container price and case price; (5) the name of the publication or publications the prices will appear in. If not published, the affidavit required by subsection (g) shall be submitted.

(b) Except in the case of still wines and sparkling wines, the case price shall be individual for each item and not in combination with another item. Schedules on multiple packages of still wines and sparkling wines shall contain the bottle price for each item contained in the multiple package, the unit price, and the case price. The bottle price posted in such multiple package case must be the same as the bottle price posted in a case containing the one type and brand of wine. The price set forth therein shall become effective on the first day of the calendar month following the effective filing date thereof and, unless withdrawn or amended, shall be considered refiled and effective each month until the filing date of the next complete schedule.

(c) Price changes and prices on new items may be filed on supplemental price schedules, which schedules shall be filed on or before the twelfth day of any month, and the prices on such supplemental schedules shall become effective on the

first day of the month following the effective filing date thereof. One copy of such supplemental price schedules showing amended prices shall be filed and only price changes and prices on new items should be listed.

(d) No changes, corrections or additions will be considered after the effective filing date, except in cases where obvious typographical errors have been made **and except where otherwise allowed by statute.**

(e) No manufacturer or wholesaler permittee may sell or offer for sale any brand of alcoholic liquor which does not appear on his price schedule. All items listed shall be bona fide offerings of the items set forth in the list and each manufacturer and wholesaler, upon request of the **department,** shall furnish the **department** with an inventory of any items that appear on his list. All liquor sold in less than case units at wholesale shall be sold at the per bottle price posted.

(f) All liquors shall be shipped and received by the purchaser in the same period for which the prices set forth in the invoices are in effect.

(g) Each manufacturer and wholesaler shall furnish each permittee customer with a copy of his price schedule, as amended, either by direct mail or by publishing his price schedule in any publication approved by the **department** of liquor control, provided, in accordance with the method used, the manufacturer, wholesaler or publication shall, on or before the tenth day of the month for which such schedule is effective, submit an affidavit that the provisions of this section have been complied with. If the manufacturer or wholesaler permittee solicits a new account, he shall, before making any sales, present a current price schedule to such account.

(h) A manufacturer or wholesaler posting prices on private labels shall submit those prices on separate sheets distinctly marked "Private Labels."

(i) Each price schedule filed shall contain the statement that the manufacturer or wholesaler is a "present authorized distributor" of all brands on which prices are quoted. If for any reason a manufacturer or wholesaler files prices on any items or brands of which he is not an authorized distributor, such items or brands shall be listed as "close-outs." Prices on so-called "close-out" items shall be filed every month even though they remain the same. Such items shall be disposed of within three months and shall not be listed on more than three successive lists without permission of the **department** and the **department** will strike from the list those items unless the distributor presents the department with satisfactory reasons for not doing so.

(j) A violation of any of the provisions of this section shall be punishable by suspension or revocation.

(Effective January 11, 1984)

APPENDIX P

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION, et al.	:	
—vs—	:	Civil No. H-84-816 (PCD)
JOHN T. HEALY, et al.	:	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs are the United States Brewers Association ("USBA") — an industry association of thirty-nine domestic brewers and twenty-three importers of beer — and those of its member companies who sell beer in Connecticut and in the bordering states of Massachusetts, New York and Rhode Island.

Defendants are the Commissioners and Secretary of the Connecticut Department of Liquor Control.

Intervening defendant Wine & Spirits Wholesalers of Connecticut is a trade association of seven companies which sell alcoholic beverages, including beer, at wholesale within Connecticut.

Plaintiffs' complaint seeks a declaratory judgment that the beer price affirmation provisions of Conn. Pub. Act

84-332,[1] 84-432[2] and § 30-63a(b) of the Connecticut Liquor

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[1] Conn. Pub. Act 84-332 provides, in relevant part:

> Each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department on a monthly basis, the bottle, can and case price, and for beer, the price per keg or barrel or fractional unit thereof, of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler and out-of-state shipper permittee for the month following such posting.
>
> . . . . .
>
> . . . . .
>
> At the time of posting of the bottle, can, keg or barrel and case price . . ., every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-of-state shipper of each brand of beer posted certifying that at the time of posting the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state. . . .
>
> . . . . .
>
> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state . . . at any time during the calendar month covered by such posting. . . .
>
> In determining the lowest price for which any item of beer is or was sold . . . at the time of posting, appropriate reductions will be made for all discounts, rebates, free goods, allowances and other inducements of any kind whatsoever, including depletion and floor-stock allowances, offered or given to any such wholesaler; provided that differentials in price which make only due allowance for the actual costs of delivery are permissible. . . . A manufacturer or out-of-state shipper of beer shall offer to Connecticut wholesalers all of the sizes, approved by the department of liquor control, of his brand which he offers to any wholesaler in any state bordering this state. . . .

[2] Conn. Pub. Act 84-432 provides, in part: "In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, [only differentials in price attributable to differences in state taxes and to delivery costs are permissible]."

Control Act[3] violate the commerce clause[4] and the supremacy clause[5] of the United States Constitution. Plaintiffs also seek a permanent injunction to restrain defendants from enforcing these statutes.

Currently pending are cross-motions for summary judgment, which have been exhaustively and intelligently briefed and rebriefed by the USBA, the intervening defendants and the State Attorney General's Office. For the reasons that follow, USBA's motion is denied, and the motion of defendants and intervening defendants is granted.

I. Background

A. The Beer Industry[6]

The beer industry in Connecticut is divided into three marketing levels: (1) brewers and importers; (2) wholesalers; and (3) retailers. Each market participant must hold a valid

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[3] Section 30-63a(b), Conn. Gen. Stat., provides, in part, that:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer . . . at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[4] "Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. Const. art. I, § 8, cl. 4.

[5] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[6] This description is based on submissions of the parties as well as the findings of Blumenfeld, J., in *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312 (D. Conn.), *rev'd*, 692 F.2d 275 (1982), *aff'd*, 464 U.S. 909 (1983).

Connecticut license to sell, in Connecticut, alcoholic beverages to the tier below and, ultimately, to consumers.

The brewers and importers market national brands such as Budweiser or Miller High Life, and regional or local brands such as Genesee Cream Ale or Piels. There are no breweries in Connecticut. All beer — national or regional — is shipped into Connecticut by brewers and importers designated as "out-of-state shippers" under Connecticut law.

Plaintiffs contend that prices charged and package configurations offered to wholesalers in Connecticut and the bordering states vary in the several markets within the four state area. (Market areas do not always coincide with state borders.) In certain markets, regional brewers or importers price their beers to allow sales to consumers at the lowest prices possible in those markets. Other brewers or importers competing in these areas must consider this competitive pricing in pricing their own product. It is agreed by all parties that the New York City market is the most competitive and prices there are the lowest in the four-state region. Other factors which have an impact on pricing and marketing decisions, such as consumer tastes, packaging, costs and freight, vary from area to area even within these states. Thus, according to plaintiffs, a variable pricing and marketing structure has emerged in Connecticut and the bordering states which results in substantial interstate competition in retail beer sales.

In Connecticut, typically more than one wholesaler sells an out-of-state shipper's products. Each wholesaler generally handles products of more than one out-of-state shipper but is restricted by law from selling to retailers outside its assigned geographical territory.

The primary retail outlets for off-premise consumption of beer in Connecticut are package and grocery stores. Retailers, particularly near the borders, face substantial competition from retail beer outlets in the bordering states. Although prices charged to Connecticut wholesalers are

neither the highest nor the lowest in the four-state region, retail prices historically have been higher in Connecticut. Accordingly, many Connecticut residents have purchased beer at lower retail prices in New York, Massachusetts or Rhode Island.

B. **Price Affirmation**

In 1981, Connecticut amended its Liquor Control Act by adding beer price affirmation provisions. The Act required out-of-state shippers to post, each month, the bottle, can and case price for the brands of beer each sells in Connecticut. The amendment required shippers to execute written affirmations under oath certifying that the posted prices "will be no higher than the lowest price at which each such item of beer is *or will be* sold . . . to any wholesaler in any state bordering this state, at any time during the calendar month covered by such posting." Liquor Control Act § 30-63b(b), as originally amended by Section 12 of Conn. Pub. Act 81-294 (emphasis added). No brewer or importer could sell beer to a wholesaler in Connecticut at a price higher than the lowest price then charged any wholesaler in any state bordering Connecticut: Liquor Control Act § 30-633a(b), as originally amended by Section 11 of Conn. Pub. Act 81-294. Once posted, the affirmed price became the controlling or fixed price for the ensuing month for the out-of-state shipper's products in Connecticut. Rebates, discounts, special promotions and other inducements which lowered the price of beer in the border states required the price to be lowered in Connecticut, but differentials in price were permitted for different state taxes and delivery costs. No allowance was made for different package configurations (e.g., a case of six-packs versus a case of loose cans or bottles), yet for any brand a brewer offered for sale in Connecticut, it had to offer Connecticut wholesalers all the units of that brand offered to wholesalers in the border states.

Thus brewers and importers in the four-state area had the following alternatives: (1) lower their Connecticut prices to

equal the lowest price in any bordering state; (2) raise prices in border states to the Connecticut levels; (3) withdraw from Connecticut the brands of beer sold at lower prices in the border states; or (4) withdraw from the border states the brands of beer sold at lower prices than the Connecticut price.

The 1981 amendments were upheld by the district court, *United States Brewers Ass'n v. Healy*, 532 F. Supp. 1312 (D.Conn. 1982), but declared unconstitutional by the Second Circuit, *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982), (hereinafter "*Healy I*"), *aff'd without opinion*, 464 U.S. 909 (1983). The Court of Appeals held that the price affirmation provisions impermissibly burdened interstate commerce and that the twenty-first amendment[7] did not authorize Connecticut to set minimum prices of beer in any other state.

Thereafter, Connecticut enacted the different version of beer price affirmation set out in notes 1-2, *supra*. Instead of requiring out-of-state brewers and importers to certify that their prices "will be" no lower in any of the border states during the month following the posting of prices in Connecticut, the new statute requires only that at the moment of affirmation the prices charged to Connecticut wholesalers *are* no higher than the lowest price then being charged in any border state.

C. The Present Controversy

In their complaint, plaintiffs originally alleged that:

> the interaction of the posting and affirmation provisions of Pub. Act 84-332 with Section 30-63a(b) of the Liquor Control Act not only limits the price at which out-of-state shippers may sell to Connecticut

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[7] "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

> wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month. Thus, as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price.

Complaint at 14. They argue that the new provisions violate the supremacy clause by requiring out-of-state shippers to establish and maintain minimum prices for each item of beer in the four-state area and by precluding them from dealing with any of their customers except on the same or more favorable terms as they dealt with other of their customers, viz, Connecticut was forcing them to engage in conduct prohibited by federal antitrust laws.

Defendants conceded that, "standing alone," Conn. Gen. Stat. § 30-63a(b), which was not amended following *Healy I*, appeared to prohibit the lowering of out-of-state prices of products sold in Connecticut during the entire month following the posting of Connecticut prices for that product. Defendants' Brief on Motion for Summary Judgment at 8. However, defendants contend that such an interpretation flies in the face of Conn. Pub. Act 84-332 which explicitly recognizes the right of out-of-state shippers to raise or lower their prices outside Connecticut at any time during the month following posting. In further support of their position, defendants filed a declaration and ruling by the Connecticut Liquor Control Commission.[8] The ruling made clear that, whatever the import of § 30-63a(b), out-of-state shippers need only affirm that at the time of posting in Connecticut (and *only* at the time of

[8] Conn. Gen. Stat. § 4-176 states that the Liquor Control Commission "may, in its discretion, issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency . . ."

posting), their prices to Connecticut wholesalers are no higher than in the border states.[9]

After the Commission's ruling,[10] plaintiffs withdrew their claim based on the supremacy clause and conceded that the affirmation laws, as interpreted by the Commission, would not directly control prices in the border states. Plaintiffs' Memorandum in Support of Their Cross-Motion for Partial Summary Judgment at 18. However, plaintiffs persist in their claim that the affirmation provisions on their face and as applied,

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[9] The Commission stated:

> [W]e must interpret [§ 30-63a(b)] in light of the obvious intention of the Connecticut General Assembly . . . Accordingly, we determine and declare that C.G.S. § 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section . . . To the extent . . . that C.G.S. § 30-63a(b) is inconsistent with [Conn. Pub. Act. 84-332], it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price.

Affidavit of the Liquor Commission at 3-4.

[10] For the importance of having definitive indications as to how any particular affirmation will be applied, *see Brown-Forman Distillers v. N.Y. Liquor Auth.*, 106 S. Ct. 2080 (1986), wherein the majority laments that "we have no means of predicting how the [New York] Liquor Authority would" react to an application for a price reduction following posting, and chastizes the dissenters for "indulging [in the] assumption that the Authority will be sensitive to Commerce Clause concerns." *Id.* at 2087, 2086 n.5. The dissent, in turn, expressed the view that the Liquor Authority, like any agency "charged with rectifying questionable applications of necessarily general rules," was entitled to a presumption of constitutionality "consistent with the respect due state administrative organs responsible for the operation of a state law whose constitutionality is challenged . . ." *Id.* at 2089-90. The ambiguity presented in *Brown-Forman* was avoided by the Commission's ruling. It is to be commended.

> are purely protectionist legislation designed to protect in-state wholesalers and retailers at the expense of out-of-state brewers, wholesalers and retailers. The purpose and effect of the new law is precisely the same as the old law — discouraging purchases of beer by Connecticut residents in the Border Strates by requiring the brewers to offer their products to Connecticut wholesalers at prices which are artificially lower than competition would warrant, or conversely, to artificially raise their prices to Border State wholesalers.

Id. at 19.

Plaintiffs' cross-motion for summary judgment is, thus, bottomed on the unconstitutionality of the amended price affirmation law. Conversely, defendants' motion is based on the claim that the legislation is constitutional.

II. Discussion

A. Summary Judgment Standard

To grant a motion for summary judgment, there can be no "genuine issue as to any material fact" and the moving party must be "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Schwabenbaur v. Board of Educ.*, 667 F.2d 305, 313 (2d Cir. 1981). "The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute." *American Int'l Group, Inc. v. London American Int'l Corp.*, 664 F.2d 348, 351 (2d Cir. 1981), quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319–20 (2d Cir. 1975). Moreover, there must be no controversy as to inferences which may be drawn from the facts of record. *Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967). In determining whether or not there is a genuine factual issue in the case, the court must "resolve all ambiguities and draw all reasonable inferences against the

moving party." *Schwabenbauer*, 667 F.2d at 313; *see also United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam); *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980). However, one against whom summary judgment is sought cannot rely on factually unsubstantiated conclusory allegations to sustain a claim that questions of fact exist. *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552–53 (1986). That both sides have moved for summary judgment "does not mean that the court must grant judgment as a matter of law for one side or the other," *Schwabenbaur*, 667 F.2d at 314, and it is error to "assume that no material facts remain in dispute simply because both parties moved for summary judgment." *In re Citizens Loan & Sav. Co.*, 621 F.2d 911, 913 (8th Cir. 1980) (citation omitted).

B. The Commerce Clause and the Twenty-First Amendment

Judges must not, in the exercise of the judicial function, undertake to second-guess the political judgment of legislators. Quite to the contrary, judges must refrain from reading their own policy preferences into the Constitution by striking down legislation deemed to be unwise or even foolish. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905); *see also 324 Liquor Corp. v. Duffy*, 107 S.Ct. 720, 733–34 (1987). Although courts must determine whether a challenged statute is or is not constitutional — a task concededly involving judgment and interpretation — legislation is presumed constitutional unless clearly shown not to be so. *State v. Warren*, 169 Conn. 207, 217 (1975). Moreover, where a statute permits of two constructions, one valid and the other invalid as unconstitutional, the valid construction should be adopted "even where it is not the obvious one." *Lublin v. Brown*, 168 Conn. 212, 219–20 (1975).

A state's authority to regulate aspects of the liquor industry is greater than other areas of regulation by virtue of the twenty-first amendment. Section 2 of that amendment provides: "The transportation or importation into any State,

Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited." Section 2 "grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Because a state may entirely exclude alcoholic beverages from its markets, less restrictive forms of regulation are within a state's authority.

> The Twenty-first Amendment thus gives the states broad power to ban, restrict, or otherwise regulate importation and in-state traffic in alcoholic beverages and thereby eliminates some of the otherwise applicable Commerce Clause constraints. For example, a state may prohibit entirely the sale of intoxicating liquors within its borders, *see State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 62-63 (1936) although under traditional Commerce Clause limitations it could not ban the sale of other products, *see, e.g., Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. [514,] 521 [(1935)] (wholesale milk) . . . . Or a state may prohibit local dealers from selling beer manufactured in another state on the ground that the latter state discriminate against beer manufactured in the first state, *see Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939), although it would not be free to impose the same type of restrictions with respect to milk, *see Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976); nor could it constitutionally prohibit the exportation of local ground water to another state on the basis that the latter state would forbid exportation of its water to the first state, *see Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Healy I, 692 F.2d at 280-281 (other citations omitted). [11]

However, as *Healy I* states, not even in the area of regulating intoxicating beverages is the authority of a state absolute.[12] The twenty-first amendment "has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor." *Joseph E. Seagrem & Sons v. Hostetter*, 384 U.S. 35, 42 (1966). The commerce clause — though worded as a grant of affirmative power to Congress — has traditionally been interpreted to limit state action which affects economic activities outside its own borders. "In general the Commerce Clause is viewed as intending to promote free trade among the states and to liberate the flow of articles in commerce from the provincialism evident in local regulations." *Healy I*, 692 F.2d at 278.[13] State statutes which directly discriminate against interstate commerce or which favor in-state economic interests over out-of-state interests are per se

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[11]The distinction drawn by the Court of Appeals between milk and liquor may not be quite as sharp following the Supreme Court's decision in *Brown-Forman* in which the Court relied heavily on *Seelig* in overturning New York's affirmation statute.

[12]The Supreme Court is currently divided as to how extensively the twenty-first amendment was intended to authorize state regulation of the liquor industry. *Compare* the opinion of the Court, (Powell, J.), in *324 Liquor Corp.*, 107 S. Ct. at 726 (the "States' Twenty-first Amendment powers, though broad, are circumscribed by other provisions of the Constitution"), *with* the dissent, (O'Connor, J.), *id.* at 730 (endorsing former Justice Black's view "that the Senators who approved the Twenty-first Amendment thought they were returning absolute control over the liquor industry to the States"). *See also Newport v. Iacobucci*, 107 S. Ct. 383 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

[13]From the late nineteenth century until the New Deal, the commerce clause was used — often in conjunction with the due process clause of the fourteenth amendment — to invalidate numerous state regulatory measures. *See, e.g., Seelig*. From 1945 to 1970 the commerce clause was invoked rarely — and the due process clause hardly at all — to strike down economic legislation. In the last decade, the Supreme Court increasingly entertained objections to state statutes based on the burdens imposed on interstate commerce. *See, e.g., New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

unconstitutional. *See, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Bacchus Imports*. Even where a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental," it will not be sustained if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citations omitted). "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084.

Thus, "the Twenty-first Amendment and the Commerce Clause 'each must be consideed in light of the other and in the context of the issues and interests at stake in any concrete case." *Id.* at 2087, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964); *see Midcal*, 445 U.S. at 109 (what is required in this area is a "pragmatic effort to harmonize state and federal powers").

C. **The Affirmation Issue**

Against the foregoing general principles, the cases in the field of liquor affirmation must be examined for their application to the legislation adopted by Connecticut.

In *Seagram*, the Supreme Court unanimously upheld a New York requirement that alcoholic beverage brand owners affirm that the price charged to New York wholesalers was "no higher than the lowest price" than was charged anywhere in the country in the *preceding* month.

> The mere fact that § 9 [the price affirmation section] is geared to appellant's pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York

> may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. . . . It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids."

Seagram, 384 U.S. at 43, quoting Osborn v. Ozlin, 310 U.S. 53, 62 (1940). Although the Court thus rejected the argument that the New York affirmation law was facially invalid, it made clear that future decisions would depend on the facts of each case. *See id.* at 52 ("it is possible that specific future application of [the statute] may engender concrete applications of constitutional dimension").

Indeed, the next challenge to New York's affirmation law, the challenge was successful. In *Brown-Forman*, the Court declared unconstitutional an amended version which required distillers to affirm that the price charged to New York wholesalers "is no higher than the lowest price at which such item of liquor *will be* sold by such [distiller] to any wholesaler anywhere" in the nation. Alcoholic Beverage Control Law § 101-b(3)(d) (McKinney Supp. 1986) (emphasis added). The Court stressed the fact that, by requiring such an affirmation, New York made it illegal for distillers to reduce prices in other states during the following month in which the posted New York prices were in effect. By so doing, New York had " 'project[ed] its legislation' into other States" in violation of the commerce clause. *Brown-Forman*, 106 S. Ct. at 2087, quoting *Seelig*, 294 U.S. at 52.

> While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other

> States surrender whatever competitive advantages they may possess. Economic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States . . . . The mere fact that the effects of New York's [affirmation law] are triggered only by sales of liquor within the State of New York . . . does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state.

Id. at 2085.

The Court distinguished *Seagram* on the ground that the earlier version of New York's affirmation law was *retrospective* in nature — requiring only that the affirmed price be no higher than the lowest price at which sales were made during the *previous* month — whereas the amended version was *prospective*. Thus, the earlier version regulated the price charged in New York in relation to prices charged outside the state, whereas the later version limited prices charged outside the state for the month after the price was posted in New York. This was precisely the distinction relied on by the Second Circuit in *Healy I* in striking down Connecticut's original beer price affirmation law (which also had a prospective reach).

> The New York statute [in *Seagram*] differed significantly from the Connecticut statute, because, unlike Connecticut's [original] beer price affirmation provisions which control brewers' *future* conduct in the states surrounding Connecticut, the New York law in *Seagram* merely required that New York prices reflect what had been charged elsewhere in the past. Thus, the New York law, although it affected the prices that manufacturers would choose to set in other states, did not limit the freedom of a manufacturer at any given time to raise or lower prices in any other state.

692 F.2d at 283.

Brown-Forman explicitly embraced *Healy I*:

> We agree with . . . the *Healy* court that a "prospective" statute such as Connecticut's [original] beer affirmation statute, or New York's liquor affirmation statute, regulates out-of-state transactions in violation of the Commerce Clause. Once a distiller has posted prices in New York, it is not free to change its prices elsewhere in the United States during the relevant month. Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce. . . . While New York may regulate the sale of liquor within its borders, and may seek lower prices for its residents [as it did in *Seagram*], it may not "project its legislation into [other States] by regulating the price to be paid" for liquor in those States.

Id. at 2086 (citations omitted).

The 1984 amendments to Connecticut's beer affirmation statute make the affirmation statute neither retrospective nor prospective but, rather, contemporaneous. Brewers must affirm that the price charged at 10:00 a.m. on the sixth day of each month to Connecticut wholesalers is no higher — *at that moment* — than the lowest price then being charged to wholesalers in the border states. The posted price must remain in effect in Connecticut for one month. Nonetheless, brewers and importers are free to raise or lower their prices in the border states. Of course a brewer or importer is still obliged to factor into its business decisions the recognition that its lowest price in any of the border states on the day of posting must be offered to Connecticut wholesalers for the ensuing month. The issue in the instant case, therefore, is whether Connecticut's requirement that prices to its wholesalers be fixed by pricing decisions in other states violates the commerce clause.

There is little doubt that Connecticut's present affirmation law would be constitutional under *Seagram*. The difficulty lies in assessing *Seagram's* precedent vitality. *Brown-Forman* decided only the questions presented in that case and left open the constitutionality of affirmation statutes less oppressive than the prospective legislation there struck down. Although the Court appeared to emphasize that the different result from that in *Seagram* resulted from the difference between retrospective and prospective affirmation laws, the Court qualified its analysis:

> While we hold that New York's prospective price affirmation statute violates the Commerce Clause, we do not necessarily attach constitutional significance to the difference between a prospective statute and the retrospective statute at issue in *Seagram*. Indeed, one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case. If there is a conflict between today's decision and the *Seagram* decision, however, there will be time enough to address that conflict should a case arise involving a retrospective statute. Because no such statute is before us now, we need not consider the continuing validity of *Seagram*.

Id. at 2087 n.6. Justice Blackmun, who joined the opinion of the Court (except for footnote 6), filed a concurrence to state that he "would go further and overrule" *Seagram*, which he characterized as "a relic of the past":

> [*Seagram*] was decided when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes that has taken place in the last two decades. I see no principled distinction that can be drawn for constitutional analysis between New York's current prospective statute and the same State's retroactive statute upheld in *Seagram* . . . . Either type, despite one's best efforts at fine tuning, operates

> to affect out-of-state transactions and violates the Commerce Clause. Our failure to overrule *Seagram* now merely preserves uncertainty and will breed or necessitate further litigation. We should face reality and overrule *Seagram*.

Id. at 2088.

Despite the "uncertainty" referred to by Justice Blackmun, Connecticut's beer affirmation statute is here held to be constitutional. Such a finding comports with the presumption of validity to which all economic regulatory legislation is entitled. Such a finding comports, also, with the spirit of the twenty-first amendment, which was intended to return broad control of the liquor industry to the states. And it accords with dicta in *Healy I* to the effect that "[g]iven the latitude allowed a state under the Twenty-first Amendment . . . *Seagram* might well validate beer price regulation less intrusive than the present Connecticut statute, such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set in the surrounding states . . . leaving those out-of-state prices unregulated by Connecticut." *Seagram*, 692 F.2d at 283-284.

Above all, such a finding is consistent with the Supreme Court's interpretation of the commerce clause as it has evolved to date. Whatever the future fate of *Seagram*, no other Justice joined Blackmun's call in *Brown-Forman* for its demise; it remains to be considered by lower courts, unless and until it is formally overruled. *Cf. Healy I*, 532 F. Supp. at 1325 n.48 (rejecting USBA's argument that *Seagram* must be relegated to a "different era" of constitutional adjudication). Under *Seagram*, Connecticut's affirmation statute is facially valid because, unlike the version in *Healy I* and *Brown-Forman*, it leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce. Although plaintiffs cite

numerous excerpts from the legislative debates over beer price affirmation to show that many voted for the measure intended it to protect local wholesalers and retailers from the competition of wholesalers and retailers in the border states,[14] the price flexibility provided by the latest amendments destroys much, if not all, of the force of their argument. Moreover, Connecticut is not seeking lower or better prices for its wholesalers relative to out-of-state wholesalers, but simply equal prices. "The legislative intent to secure 'fairer' or 'more equal' competition can hardly be characterized as 'protectionist' within the meaning of the Commerce Clause." *Healy I*, 532 F. Supp. at 1323.

In addition to being facially valid, the statute also passes muster under the second of the two-tier standard enunciated in *Pike*. "[T]he critical consideration" — under either test — "is the overall effect of the statute on both local and interstate activity." *Brown-Forman*, 106 S. Ct. at 2084. Crediting USBA's assertions that some business of Connecticut residents previously going to border state retailers will shift to Connecticut retailers, and that some "artificially" high prices (in the border states) and/or some "artificially" low prices (in Connecticut) will result from beer price affirmation even as amended, the "mere fact" that an affirmation law "is geared to . . . pricing policies in other States is not sufficient to invalidate the statute" because a state may "constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country," *Seagram*, 384 U.S. at 43, and because a "non-discriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). Any state economic regulatory legislation exerts some impact on interstate commerce and courts should be cautious in striking down such legislation merely because "the faintest

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[14]On this point, see the district court opinion in *Healy I*, 532 F. Supp. at 1318 n.16, 1323 n.41.

economic ripples begin to flow outside state borders . . . ." *Brown-Forman*, 106 S. Ct. at 2091 n.8 (Stevens, J., dissenting). The disincentive to Connecticut consumers to buy outside the state, not shown to be of more than minor economic significance, and the necessity that brewers set their prices in the border states knowing that they are simultaneously setting their prices in Connecticut are not an excessive intrusion on commerce. Because Connecticut's statute operates evenhandedly and serves a legitimate purpose in reducing discrimination in pricing to wholesalers in Connecticut as opposed to out-of-state wholesalers, such incidental and indirect burdens on interstate commerce do not outweigh the resulting local benefits.

Finally, it is worth noting that the commerce clause, though often construed as restrictive of a state's authority, does not prohibit anything. It is a positive grant of authority to Congress to regulate matters of national economic importance. Since Connecticut is only one of over thirty states with affirmation laws, the problems posed by "overlapping and potentially conflicting affirmation statutes," *id.* at 2088 (Blackmun, J., concurring)[15] are appropriate subjects for Congress to address — consistent, of course, with the limits imposed on both Congress and courts by the twenty-first amendment. To date, Congress has not done so. Plaintiffs may press their case in the national legislative arena, a better use of the powers created by the Constitution than to have this court strike down state regulatory legislation with a legitimate local purpose that does not impermissibly burden interstate commerce.

Accordingly, defendants' motion for summary judgment is granted.

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[15]Statutes, such as Connecticut's, enacted in several states, though overlapping, are unlikely to conflict, but, as pointed to prices at the lowest common denominator, are more likely to produce harmony, i.e., uniform low prices.

SO ORDERED.

Dated at Hartford, Connecticut, this 11th day of September, 1987.

/s/ Peter C. Dorsey

Peter C. Dorsey
United States District Judge

APPENDIX Q

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION, ET AL.	)	
VS.	)	CIVIL H-84-816 PCD
JOHN T. HEALY, ET AL.	)	

JUDGMENT

This action having come on for consideration of the cross-motions for summary judgment before the Honorable Peter C. Dorsey, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Cross-Motions for Summary Judgment, granting the defendants motion,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendants.

Dated at Hartford, Connecticut, this 15th day of September 1987.

KEVIN F. ROWE,
Clerk

By Dennis P. Iavarone

Dennis P. Iavarone
Deputy in Charge

APPENDIX R

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

[Title omitted in printing]

NO. H 84 816 PCD

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Plaintiffs, The Beer Institute (formerly named United States Brewers Association, Inc.); Anheuser-Busch, Inc.; G. Heileman Brewing Company; The Genesee Brewing Company, Inc.; Miller Brewing Company; All Brand Importers, Inc.; Dribeck Importers, Inc.; Guiness-Harp Corp.; Labatt Importers, Inc.; Martlett Importing Company, Inc.; Monterey Bay Company, Inc.; and Van Munching Company, Inc., hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment entered by the Clerk of this Court on September 15, 1987 in the above-captioned action which granted the defendants' motion for summary judgment, denied plaintiffs' cross-motion for summary judgment and entered judgment for defendants. Plaintiffs appeal from each and every part of the aforesaid Judgment.

Dated: Hartford, Connecticut
October 13, 1987

DAY, BERRY & HOWARD

By /s/ J. Charles Mokriski

(A Member of the Firm)
J. Charles Mokriski
City Place
Hartford, Connecticut 06103-3499
(203) 275-0100
Attorneys for Plaintiffs

SKADDEN, ARPS, SLATE
MEAGHER & FLOM
919 Third Avenue
New York, New York 10022
(212) 735-3000
Attorneys for Plaintiff
Anheuser-Busch, Inc.

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700
Attorneys for Plaintiff
Miller Brewing Company

COVINGTON & BURLING
1201 Pennsylvania, N.W.
Washington, D.C. 20044
(202) 662-6000
Attorneys for Plaintiffs
The Beer Institute,
G. Heileman Brewing Company,
The Genessee Brewing
Company, Inc.,
All Brand Importers, Inc.,
Dribeck Importers, Inc.,
Guiness-Harp Corp.,
Labatt Importers Inc.,
Martlett Importing Company,
Inc.,
Monterey Bay Company, Inc., and
Van Munching Company, Inc.

GARY NATEMAN, ESQ.
The Beer Institute
1750 K Street, N.W.
Washington, D.C. 20006
(202) 331-0300
Attorney for Plaintiff
The Beer Institute

[Certificate of Service omitted in printing]

APPENDIX S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 721 — August Term, 1987

(Argued March 18, 1988 Decided JUN 13 1988)

Docket No. 87-7880

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York and Rhode Island:

Anheuser-Busch, Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

ANHEUSER-BUSCH, INC; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY INC., MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC., GUINESS-HARP CORP.; LABATT IMPORTERS, INC., MARTLETT IMPORTING COMPANY, INC.; MONTEREY BAY COMPANY, INC.; and VAN MUNCHING COMPANY, INC.,

Plaintiffs-Appellants,

—against—

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control,

Defendants-Appellees,

WINE AND SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.,

Intervenors
Defendants-Appellees.

Before: TIMBERS, PRATT and MINER, *Circuit Judges.*

Appeal from a summary judgment in favor of appellees entered in the United States District Court for the District of Connecticut (Dorsey, J.), holding that the amended beer price affirmation provisions of the Connecticut Liquor Control Act did not violate the commerce clause.

Reversed.

JEFFREY GLEKEL, New York, NY (Timothy G. Reynolds, Skadden, Arps, Slate, Meagher & Flom, New York, NY; William H. Allen, Covington & Burling, Washington, DC; Jerome I. Chapman, Arnold & Porter, Washington, DC; Gary Nateman, The Beer Institute, Washington, DC, of counsel) *for Plaintiffs-Appellants.*

ROBERT F. VACCHELLI, Asst. Conn. Atty. Gen., Newington, CT (Joseph I. Lieberman, Conn. Atty. Gen., Richard M. Sheridan, Asst. Conn. Atty. Gen., of counsel) *for Defendants-Appellees.*

WILLIAM A. WECHSLER, Hartford, CT (Alfred F. Wechsler, Gregory J. Southworth, Bailey & Wechsler, Hartford, CT, of counsel) *for Intervenors-Defendants-Appellees.*

MINER, *Circuit Judge*:

Plaintiffs-appellants The Beer Institute (formerly United States Brewers Association), an industry association of beer brewers and importers, *et al.*, commenced an action in the United States District Court for the District of Connecticut (Dorsey, J.) against defendants-appellees John F. Healy and David L. Snyder, as Commissioners of the Connecticut Department of Liquor Control, and Charles Kasmer, as Secretary of the Department. The complaint asserted that the amended beer price affirmation provisions of the Connecticut Liquor Control Act, 1984 Conn. Acts 332, 432, and § 30-63a(b) of that Act violate the commerce clause, U.S. Const. art. I, § 8, cl. 3, and the supremacy clause, *id.* art. VI, cl. 2. Plaintiffs sought declaratory and injunctive relief to prevent enforcement of these provisions.

Upon cross-motions for summary judgment, the district court granted judgment for the defendants, holding that the challenged provisions were constitutional. *See United States Brewers Ass'n v. Healy*, 669 F. Supp. 543 (D. Conn. 1987). Plaintiffs appeal from this judgment. Because we find that the amended beer price affirmation provisions place an unconstitutional burden on interstate commerce, we reverse.

BACKGROUND

In *United States Brewers Ass'n v. Healy*, 692 F.2d 275 (2d Cir. 1982) ("*Healy I*"), *aff'd*, 464 U.S. 909 (1983) (per curiam), we found that the original beer price affirmation provisions of the Connecticut Liquor Control Act placed an unconstitutional burden on interstate commerce. The Act, now as then, requires "posting" of prices, whereby brewers and out-of-state beer importers "file a schedule stating the per-unit price that [they] will charge Connecticut wholesalers for [beer] products in the following month," *id.* at 276 (footnoted omitted); *see* Conn. Gen. Stat. Ann. § 30-63c (West 1975 & Supp. 1988). Posted prices become effective on the first day of the calendar month following the posting. *See* Conn.

Agencies Regs. § 30-6-B12(b). We noted that "[h]istorically the retail price of beer has been generally higher in Connecticut than in its neighboring states, *i.e.*, Massachusetts, New York, and Rhode Island," 692 F.2d at 276.

To encourage Connecticut residents to buy beer in-state rather than in the neighboring states, the legislature added beer price affirmation provisions to the Act. These provisions required that: (1) brewers adhere to the posted prices during the one-month period for which they were posted, Conn. Gen. Stat. Ann. § 30-63(c); (2) brewers file a sworn affirmation that their posted per-unit prices would be no higher than their prices in the border states for the same period, *id.* § 30-63b(b); (3) Connecticut wholesalers be charged per-unit prices by each brewer no higher than the lowest wholesale price the brewer charges in any border state, *id.* § 30-63a(b); (4) adjustments for rebates, discounts, allowances and any other inducements offered to out-of-state wholesalers be considered in calculating the "lowest" price, *id.* § 30-63c(b); and (5) brewers offer to Connecticut wholesalers all the sizes and packages of their brands offered to border state wholesalers, *id.* Because there are no breweries in Connecticut and all beer is shipped into Connecticut from other states, only out-of-state brewers and importers are affected by the Connecticut price affirmation law.

In striking down the price affirmation provisions as facially invalid, this court observed that they told "a brewer that for any given month when it sells beer to a wholesaler in Massachusetts, New York, or Rhode Island, it may not do so at a price lower than that it has previously announced it will charge to Connecticut wholesalers," *Healy I*, 692 F.2d at 282. "Thus," we concluded, "the obvious effect of the Connecticut statute is to control the minimum price that may be charged by a non-Connecticut brewer to a non-Connecticut wholesaler in a sale outside of Connecticut," *id.*, in violation of the commerce clause.

Thereafter, the Connecticut Legislature amended the affirmation provisions with the stated purpose of remedying the constitutional problem. Section 30-63b(b) was amended to provide that the "lowest" price charged to border-state wholesalers is determined "at the time of posting," 1984 Conn. Acts 332 ("84-332").[1] At the same time, section 30-63b(e)[2] was added, providing that § 30-63b did not prohibit brewers from changing prices in other states "at any time during the calendar month covered by such posting." However, § 30-63a(b),[3] which prevents brewers from charging Connecticut wholesalers more than their lowest border-state price during the posted period, was not amended. Section 30-63c(b), which establishes how price will be determined under the statute, also was amended by 84-332 to refer to "price . . . at the time of posting." Another amendment applicable to § 30-63c(b) contained a conflicting description of price. This amendment permits only differentials in state taxes and actual delivery costs to be excluded from the determination of "the lowest price" charged to any border-state wholesaler "*during such posted period*," 1984 Conn. Acts 432 ("84-432")[4] (emphasis added), despite the "time of posting" amendment made by 84-332.

Appellants commenced this action on July 25, 1984. In their complaint appellants alleged that " 'the interaction of the posting and affirmation provisions' " of 84-332 and § 30-63a(b) " 'not only limits the price at which out-of-state shippers may sell to Connecticut wholesalers, but also sets the lowest price which an out-of-state shipper may charge anywhere in the Border States during the succeeding month,' " 669 F. Supp. at 547 (quoting Complaint at 14). " 'Thus,' " they alleged, " 'as under the original price affirmation scheme, an out-of-state shipper is not free to lower any Border State price below the previously affirmed Connecticut price,' " *id.* This, they claimed, violated not only the commerce clause, but the supremacy clause as well, "by requiring out-of-state shippers to establish and maintain minimum prices for each item of beer in the four-state area and by precluding them from dealing with any of their customers except on the same or more favorable terms as they dealt with other of their customers," *id.*

The state recognized that § 30-63a(b) " 'standing alone' " seemingly would prevent brewers from lowering the out-of-state prices of products they also sold in Connecticut during the entire month after posting. The state argued, however, that 84-332 made it clear that the price affirmed as the lowest price in the border states need only be effective *at the moment of posting:* brewers are free both before and after posting to raise or lower their prices outside Connecticut. (The posted Connecticut price remains in effect for the following calendar month.) The state submitted a Declaration and Ruling of the Connecticut Liquor Control Commission, made pursuant to the Commission's discretionary authority to "issue declaratory rulings as to the applicability of any statutory provision or of any regulation or order of the agency," Conn. Gen. Stat. Ann. § 4-176, providing, *inter alia:*

> "[W]e must interpret [§ 30-63a(b)] in light of the obvious intention of the Connecticut General Assembly. . . . Accordingly, we determine and declare that C.G.S. § 30-63a(b) mandates only that the brewer in a sale to a Connecticut wholesaler not exceed its previously posted price in Connecticut, but that a sale at a price lower in a border state, during the calendar month covered by such posting, does not contravene this section. . . . To the extent . . . that C.G.S. § 30-63a(b) is inconsistent with [Conn. Pub. Act 84-332], it must be considered impliedly repealed since the latest expression of the legislature controls. Thus under the new affirmation scheme an out-of-state shipper is free to lower any border state price below the previously affirmed Connecticut price."

669 F. Supp. at 547 n.9 (quoting Affidavit of the Liquor Commission at 3-4). Thereafter, appellants withdrew their supremacy clause claim. *See id.* at 548.

The district court observed that "[t]he ruling made clear that, whatever the import of § 30-63a(b), out-of-state shippers need only affirm that at the time of posting in Connecticut

(and *only* at the time of posting), their prices to Connecticut wholesalers are no higher than in the border states," *id.* at 547 (footnote omitted). Judge Dorsey found that "[t]he 1984 amendments to Connecticut's beer affirmation statute make the affirmation statute neither retrospective nor prospective but, rather, contemporaneous," *id.* at 551–52.[5] He therefore framed the issue as "whether Connecticut's requirement that prices to its wholesalers be fixed by pricing decisions in other states violates the commerce clause," *id.* at 552.[6]

Judge Dorsey had "little doubt that Connecticut's present affirmation law would be constitutional under *Seagram [v. Hostetter,* 384 U.S. 35 (1966)]," *id.*, which upheld a *retrospective* affirmation requirement that the New York wholesale price was no higher than the lowest price in any other state during the *preceding* month. However, noting that *Seagram* had been questioned by the Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573 (1986), Judge Dorsey held that the affirmation provisions nonetheless were constitutional, both on their face and in their effect, because: (1) "unlike the version in *Healy I* and *Brown-Forman,*" this statute "leaves brewers free to raise or lower prices in the border states before and after posting in Connecticut and does not, therefore, regulate interstate commerce," 669 F. Supp. at 553; (2) "Connecticut is not seeking lower or better prices for its wholesalers relative to out-of-state wholesalers, but simply equal prices," *id.;* and (3) the statute "operates even-handedly" and legitimately reduces price discrimination against Connecticut wholesalers, *id.* Holding the amended price affirmation provisions constitutional, he stated, "comports with the presumption of validity to which all economic regulatory legislation is entitled" and "with the spirit of the twenty-first amendment, which was intended to return broad control of the liquor industry to the states," *id.* at 552.

On appeal, appellants, as they did in *Healy I,* "have launched an all-out attack on the Connecticut beer price affirmation provisions under the [c]ommerce [c]lause," 692 F.2d at

281, contending that the provisions are protectionist in purpose and effect, are subverted by the *Brown-Forman* decision because it has "significantly undermine[d]" the precedential authority of *Seagram*, and operate to regulate beer prices in the border states in violation of the commerce clause and in excess of Connecticut's regulatory powers under the twenty-first amendment. Because we agree that the realities of beer price regulation in the border state area show that Connecticut's statute inevitably exercises control over "the prices set for sales occurring wholly outside its territory," *id.* at 282, we do not reach the issue of economic protectionism. Accordingly, we hold that the amended Connecticut beer price affirmation provisions directly regulate interstate commerce in violation of the Constitution.

DISCUSSION

A. Commerce Clause

The commerce clause generally forbids "[s]tate regulation that is designed to confer economic benefits on [its] businesses and residents . . . at the expense of businesses and residents of other states," *Healy I*, 692 F.2d at 279; *see, e.g., Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 350–53 (1977). However, "the fact that the law may not have been intended as protectionist or discriminatory will not save it" when the "effect of a state's law is to regulate conduct occurring wholly outside the state," *Healy I*, 692 F.2d at 279; *see, e.g., Edgar v. Mite Corp.*, 457 U.S. 624, 642–43 (1982) (opinion of White, J.); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 199 (1925). Thus, "[w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests," it generally is invalidated "without further inquiry," *Brown-Forman*, 476 U.S. at 579; *see, e.g., City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). When a statute only indirectly affects interstate commerce and regulates evenhandedly, the inquiry is "whether the [s]tate's interest [in regulation] is

legitimate and whether the burden on interstate commerce clearly exceeds the local benefits," *Brown-Forman*, 476 U.S. at 579; *see Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The Supreme Court has emphasized that whether the regulation is direct or indirect, "the critical consideration is the overall effect of the statute on both local and interstate activity," *Brown-Forman*, 476 U.S. at 579; *see Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440–41 (1978), and the interaction of the statute with the regulatory schemes of neighboring states constitutes an "overall effect" which appropriately is considered. *See Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 671 (1981) (plurality) (Iowa law prohibiting 65-ft. double-trailer trucks "now out of step with the laws of all other Midwestern and Western States"); *Raymond Motor Transp.*, 434 U.S. at 445 (Wisconsin double-truck length limitations prevented interline transfers "from carriers that operate only in the 33 States where the doubles are legal"); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527–28 (1959) (interference with interline transfers by unique Illinois mudguard law); *Southern Pacific Co.*, 325 U.S. at 774–75 (1945) (Arizona train-length law effectively "control[led] train operations beyond the boundaries of the state" by requiring dismantling and reforming of interstate trains at state line); *see also Silver v. Woolf*, 694 F.2d 8, 14 (2nd Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).

The district court found that the amended Connecticut beer price affirmation provisions do not regulate interstate commerce because they do not prohibit brewers from raising or lowering beer prices in the border states prior to, or following, the Connecticut posting. However, the court did not examine whether in fact the interaction of the Connecticut provisions with the beer price regulations of bordering states would allow such pricing flexibility. Since Connecticut has chosen to regulate beer prices *in reference to* the regulated prices in the border states, it is particularly appropriate to examine the effect of the Connecticut beer price affirmation provisions resulting from their interaction with the regulatory

schemes of the border states. *See Brown-Forman*, 476 U.S. at 580, 583–84.

The Massachusetts beer pricing scheme requires brewers to post prices by the first day of the month to become effective on the first day of the following calendar month. These posted prices cannot be changed by the brewer. *See* Mass. Ann. Laws ch. 138, § 25B(d) (Law. Co-op. 1981). As interpreted by the Liquor Control Commission, the Connecticut law requires brewers to affirm that the beer prices they post, at 10:00 a.m. on the sixth day of each month, *see* Conn. Agencies Regs. § 30-6-B4a, are no higher than the prices that the brewer is then charging in the border states.

Thus, for example, a brewer who posts his February prices for Massachusetts on January 1 must look ahead to the posting and affirmation of his March prices on February 6 in Connecticut. The February prices that he posts in Massachusetts on January 1 will be effective and unchangeable at the time he must post and affirm his Connecticut prices for March on February 6. Therefore, the brewer cannot post a price in Massachusetts that is lower than the price he plans to post over a month later in Connecticut. In this way, a brewer posting his next-month's beer prices in Massachusetts does so under the restriction of Connecticut's affirmation law, which requires that the Connecticut price not be "higher than the lowest price at which such item is then being sold or offered for sale or shipped . . . to any wholesaler" in a border state, Conn. Gen. Stat. Ann. § 30-63a(b). Moreover, the price that the brewer posts in Massachusetts, as he looks ahead to the Connecticut affirmation day, will be effective not merely on that day, but for that *entire* month in Massachusetts. A brewer can therefore undertake competitive pricing based on the market realities of either Massachusetts or Connecticut, but not both, because the Connecticut statute ties pricing to the regulatory schemes of the border states.

In New York, a price that is decreased "per case, draft package or special package of beer sold to beer wholesalers"

cannot be raised for at least 180 days. *See* N.Y. Alco. Bev. Cont. Law § 55-b(2) (McKinney 1987). A brewer who plans to decrease his New York prices on a particular beer package, like the brewer posting his prices in Massachusetts, is confronted with the Connecticut posting and affirmation requirements. Once a price decrease becomes effective in New York, that price will control the price he may offer in Connecticut. On the sixth day of each month in which the New York price reduction is effective, the Connecticut statute will not allow the brewer to charge a higher price in Connecticut for the following month, no matter what the market realities would otherwise dictate. Thus, a brewer could not raise his Connecticut price above the New York level for a total of six calendar months, because the Connecticut statute, in effect, makes the New York pricing decision a decision for Connecticut as well. In addition, the Connecticut affirmation day falling in the last month of the New York price decrease would give Connecticut the benefit of the decreased price for a calendar month beyond the date that it terminates in New York. Clearly this restricts a brewer's ability to promote a beer in New York that also is sold in Connecticut. Moreover, a brewer who sells in both markets would be severely hampered in his ability to respond to market forces, particularly to the competitive demands of the New York City market, the most competitive and lowest priced market in the four-state region, *see* 669 F. Supp. at 546.

Both the Massachusetts and New York statutes provide for administrative exemptions from the beer pricing laws. *See* Mass. Ann. Laws ch. 138, § 25B(d) (exemption only by "written permission of the [Alcoholic Beverages] [C]ommission . . . granted for good cause shown and for reasons not inconsistent with the purpose of this chapter"); N.Y. Alco. Bev. Cont. Law § 55-b(3)(c) ("for good cause shown to its satisfaction" Liquor Authority "may grant waivers to licensees adversely affected by this section"). However, the possibility that an administrative agency may in its discretion grant a deviation from regulatory requirements cannot save the Connecticut statute or shift the responsibility for its effects upon the

regulatory bodies of other states. As the Court observed in *Brown-Forman*, "[w]e would not solve the constitutional problems inherent" in Connecticut's amended affirmation provisions "by indulging the . . . assumption that the [Liquor] Authority will be sensitive to [c]ommerce [c]ause concerns . . . . The protection afforded by the [c]ommerce [c]lause cannot be made to depend on the good grace of a state agency," 476 U.S. at 582 n.5.

Connecticut's affirmation provisions also regulate beer prices in another way: restricting a brewer's ability to offer volume discounts in the border states. While volume discounting is unlawful in Connecticut, *see* Conn. Gen. Stat. Ann. § 30-63(b), it is not generally prohibited in the border states. Brewers complying with the Connecticut affirmation statute must affirm that their prices for the entire state are no higher than any volume-discounted prices offered in competitive border-state markets. The effect of the Connecticut statute is to restrict a brewer's ability to offer volume discounts in competitive markets of the border states since the brewer could then not charge a higher price in the less competitive Connecticut market. In this way, as well, the Connecticut statute regulates pricing in other states.

Connecticut urges us to uphold the statute under *Seagram*. However, Connecticut can find no solace in *Seagram*. We observed in *Healy I* that "the holding in *Seagram* might well validate beer price regulation less intrusive than the" former Connecticut affirmation provisions, "such as a requirement simply that a brewer set its Connecticut prices at the lowest levels it chooses to set it in the surrounding states," 692 F.2d at 283-84. We did not thereby endorse regulation which had the effect of controlling wholesaler beer prices in other states. In fact, we indicated that the validity of such an amended scheme turned on its "leaving those out-of-state prices unregulated by Connecticut," *id.* at 284.

Moreover, the Court has cast doubt upon the continuing validity of the principles underlying *Seagram*. The *Brown-Forman* majority did "not necessarily attach constitutional

significance to the difference between a prospective statute," such as the one it struck down, "and the retrospective statute at issue in *Seagram*." 476 U.S. at 584 n.6. The Court recognized that "one could argue that the effects of the statute in *Seagram* do not differ markedly from the effects of the statute at issue in the present case" but declined to "consider the continuing validity of *Seagram*" since no retrospective statute was before the Court. *Id.* Writing separately, Justice Blackmun would have overruled *Seagram* as "a relic of the past" decided "when affirmation statutes were comparatively new and long before the proliferation of overlapping and potentially conflicting affirmation statutes," *id.* at 586 (Blackmun, J., concurring). He saw "no principled distinction" between the two types of statutes because both, "despite one's best efforts at fine-tuning, operat[e] to affect out-of-state transactions and violat[e] the [c]ommerce [c]lause," *id.*; Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 188 (1987) (concluding "that *all* liquor price affirmation statutes violate the commerce clause").

We, of course, are not empowered to overrule Supreme Court precedent. However, we clearly perceive that the basis of the *Seagram* decision has been eroded and that the Court has indicated strongly that *Seagram* may not survive the decision in *Brown-Forman*. In fact, the *Seagram* court recognized that it perhaps had not had the last word, observing that there would be "time enough to assess the alleged extraterritorial effects" of affirmation statutes "when a case arises that clearly presents them," 384 U.S. at 43. This is such a case. Accordingly, we decline to *extend* the *Seagram* precedent to validate a simultaneous affirmation provision that, by its purposeful interaction with border-state regulatory schemes, operates to control prices beyond Connecticut's borders.

B. **Twenty-First Amendment**

Connecticut maintains that the beer price affirmation provisions represent a valid exercise of its power under the twenty-first amendment "to regulate, or prohibit entirely, the

transportation or importation of intoxicating liquor within [its] borders," *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720, 726 (1987). However, "[i]t is well settled that the [t]wenty-first [a]mendment did not entirely remove state regulation of alcohol from the reach of the [c]ommerce [c]lause." *Brown-Forman*, 476 U.S. at 584. The amendment reserves to states power to regulate " '*transportation* or *importation*' " of liquor " '*into* any [s]tate . . . for delivery or use *therein*,' " *Healy I*, 692 F.2d at 281 (emphasis added), but in no way "modifies the traditional [c]ommerce [c]lause principles that bar a state from regulating the transport, sale, or use of products outside of its own territory," *id.* Thus, our conclusion that the Connecticut statute acts as a direct regulation of beer pricing in other states sufficiently disposes of this issue. *See Brown-Forman*, 476 U.S. at 585. Moreover, the extraterritorial effect of Connecticut's affirmation provisions, particularly as to volume discounting, "may interfere with the ability of other [s]tates to exercise their own authority under the [t]wenty-first [a]mendment" by impinging upon their "regulatory goals" or by "depriv[ing] their citizens of the opportunity to purchase brands of liquor that are sold" in Connecticut, *id.*

CONCLUSION

In light of the foregoing, we hold that the amended Connecticut beer price affirmation provisions directly regulate interstate commerce in violation of the commerce clause. Accordingly, we reverse the judgment of the district court and remand for entry of judgment in favor of plaintiffs.

FOOTNOTES

[1] As amended by 1984 Conn. Acts 332, § 30-63b(b) provides:

> At the time of posting of the bottle, can, keg or barrel and case price required by section 30-63, every holder of a manufacturer or out-of-state shipper's permit, or the authorized representative of a manufacturer, shall file with the department of liquor control a written affirmation under oath by the manufacturer or out-

(continued)

> of-state shipper of each brand of beer posted certifying that, at the time of posting, the bottle, can or case price, or price per keg, barrel or fractional unit thereof, to the wholesaler permittees is no higher than the lowest price at which each such item of beer is sold, offered for sale, shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[2] As added by 1984 Conn. Acts 332, § 30-63b(e) provides:

> This section shall not prohibit a manufacturer or out-of-state shipper permittee or the authorized representative of a manufacturer from changing prices to any wholesaler in any other state of the United States or in the District of Columbia, or to any state or agency of a state which owns and operates retail liquor outlets at any time during the calendar month covered by such posting.

[3] Section 30-63a(b) provides:

> No holder of any manufacturer or out-of-state shipper's permit shall ship, transport or deliver within this state, or sell or offer for sale to a wholesaler permittee any brand of beer as defined in section 30-1, at a bottle, can or case price, or price per keg, barrel or fractional unit thereof, higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such manufacturer or out-of-state shipper to any wholesaler in any state bordering this state.

[4] 1984 Conn. Acts 432 provides in pertinent part:

> In determining the lowest price for which any item of beer is or was sold, offered for sale, shipped, transported or delivered during such posted period by any manufacturer or out-of-state shipper to a wholesaler in any state bordering this state, [only differentials in price attributable to differences in state taxes and to delivery costs are permissible].

[5] A "retroactive" affirmation statute "require[s] prices to an in-state wholesaler to be at the lowest price at which the product was sold elsewhere during an earlier time period." *Brown-Forman Corp. v. New Mexico Dep't of Alco. Bev. Cont.*, 672 F. Supp. 1383, 1385 (D. N.M. 1987). "Prospective" affirmation "uses as its reference point the price for out-of-state sales

(continued)

of liquor in the future." *Id.* A "simultaneous" (also known as "contemporaneous" or "concurrent") affirmation requires that "at *the moment*" of posting or sale the price to the in-state wholesaler "matches the lowest price at which the product is being sold elsewhere." *See id.; see also* Note, *Liquor Price Affirmation Statutes and the Dormant Commerce Clause*, 86 Mich. L. Rev. 186, 190 n.31 (1987) ("Simultaneous statutes . . . represent a subdivision of the prospective category," retaining its "future-price orientation" but allowing "freedom to change [out of state] prices after the schedule's effective month has begun.").

[6] Several courts have found that simultaneous price affirmation statutes directly regulate out-of-state liquor prices in violation of the commerce clause. *See Brown-Forman Corp. v. New Mexico Dep't of Alco. Bev. Cont.*, 672 F. Supp. 1383 (D. N.M. 1987); *Brown-Forman Corp. v. Tennessee Alco. Bev. Comm'n*, No. 3-86-0926, slip op. (M.D. Tenn. June 30, 1987); *Brown-Forman Corp. v. South Carolina Alco. Bev. Comm'n*, 643 F. Supp. 943 (D. S.C. 1986). The affirmation required by these statutes, however, was not simultaneous with posting, but rather with each sale: Brewers were required to affirm that *"at the moment of sale"* the price to the in-state wholesaler "matches the lowest price at which the product is being sold elsewhere," *Brown-Forman*, 672 F. Supp. at 1385. *See Brown-Forman*, slip op. at 2; *Brown-Forman*, 643 F. Supp. at 947.

APPENDIX T

United States Court of Appeals
FOR THE
SECOND CIRCUIT

CONN.
84 CV 816
DORSEY

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of June one thousand nine hundred and eighty-eight.

Present: HON. WILLIAM H. TIMBERS,
HON. GEORGE C. PRATT, [SEAL]
HON. ROGER J. MINER,

Circuit Judges,

THE BEER INSTITUTE (formerly named UNITED STATES BREWERS ASSOCIATION, INC.) as an association, and on behalf of its following members selling beer in the State of Connecticut and the bordering States of Massachusetts, New York, and Rhode Island:

Anheuser-Busch, Inc., Miller Brewing Company, Latrobe Brewing Company, Pabst Brewing Company, The Stroh Brewery Company.

Docket No. 87-7880

ANHEUSER-BUSCH, INC.; G. HEILEMAN BREWING COMPANY; THE GENESEE BREWING COMPANY INC., MILLER BREWING COMPANY; ALL BRAND IMPORTERS, INC.; DRIBECK IMPORTERS, INC., GUINESS-HARP CORP.; LABATT IMPORTERS, INC., MARTLETT IMPORTING COMPANY, INC., MONTEREY BAY COMPANY, INC., and VAN MUNCHING COMPANY, INC.,

Plaintiffs-Appellants, *(continued)*

(continued)

— against —

JOHN F. HEALY and DAVID L. SNYDER, as Commissioners of the Department of Liquor Control; and CHARLES KASMER, as Secretary of the Department of Liquor Control,

Defendants-Appellees,

WINE SPIRITS WHOLESALERS OF CONNECTICUT, INC., as an association, and on behalf of its following members selling alcoholic liquor in the State of Connecticut:

JOHNNY BARTON, INC.; THE BRESCOME DISTRIBUTORS CORPORATION; CONNECTICUT DISTRIBUTORS, INC.; EDER BROS., INC.; GALLO WINE MERCHANTS INC.; ALLAN S. GOODMAN, INC.; and HARTLEY & PARKER LIMITED, INC.,

Intervenors Defendants-Appellees.

ISSUED AS MANDATED: 9-8-88

APPENDIX U

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES BREWERS ASSOCIATION INC. AS ASN ASSOCIATION, ET AL.	)	
vs.	)	CIVIL H-84-816 PCD
JOHN F. HEALY, ET AL.	)	

JUDGMENT

This action having been remanded to the District Court by the U.S. Court of Appeals for the Second Circuit reversing this Court's ruling and ordereding the judgment shall enter for the plaintiffs.

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the plaintiffs in accordance with the Mandate of the U.S. Court of Appeals for the Second Circuit.

Dated at Hartford, Connecticut, this 20th day of September 1988.

KEVIN F. ROWE, Clerk

By /s/ Dennis P. Iavarone

Dennis P. Iavarone
Deputy in Charge

APPENDIX V

UNITED STATES COURT OF APPEALS
FILED
JUN 29 1988
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE BEER INSTITUTE, et al Plaintiffs	:	DOCKET NO. 87-7880
V.	:	
JOHN F. HEALY, et al Defendants	:	JUNE 28, 1988

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John F. Healy and David L. Snyder, as Commissioner of the Department of Liquor Control, and Charles Kasmer, as Secretary of the Department of Liquor Control, the Defendants above named, hereby appeal to the Supreme Court of the United States from the final order reversing the District Court entered in this action on June 13, 1988.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254(2).

Dated at Hartford, Connecticut, this 28th day of June, 1988.

DEFENDANTS
JOHN F. HEALY, ET AL

JOSEPH I. LIEBERMAN
ATTORNEY GENERAL

/s/ Robert F. Vacchelli

Robert F. Vacchelli
Assistant Attorney General
Counsel of Record for the
Defendant-Appellants
John F. Healy, et al.
(A member of the Bar of the
U.S. Supreme Court)

/s/ Richard M. Sheridan

Richard M. Sheridan
Assistant Attorney General
Office of the Attorney General
MacKenzie Hall
110 Sherman Street
Hartford, CT 06105
Tel: (203) 566-7570

[Proof of Service omitted in printing]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

THE BEER INSTITUTE, et al Plaintiffs	: :	Docket No. 87-7880
v.	:	
JOHN F. HEALY, et al Defendants	: :	July 5, 1988

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Wine and Spirits Wholesalers of Connecticut, Inc., as an association and on behalf of its following members selling alcoholic liquor in the State of Connecticut: Johnny Barton, Inc.; the Brescome Distributors Corporation; Connecticut Distributors, Inc.; Eder Bros., Inc.; Gallo Wine Merchants, Inc.; Allan S. Goodman, Inc.; and Hartley & Parker Limited, Inc., Intervenor Defendants in the aforementioned action, hereby appeal to the Supreme Court of the United States from the final order reversing the District Court entered in this action on June 13, 1988.

This appeal is taken pursuant to 28 U.S.C. Sec. 1254 (2).

Dated at Hartford, Connecticut, this 5th day of July, 1988.

INTERVENOR-DEFENDANTS
WINE AND SPIRITS WHOLESALERS
OF CONNECTICUT, INC.

William A. Wechsler
Bailey and Wechsler
66 Forest Street
Hartford, CT. 06105
Tel: (203) 525-9191

[Proof of Service omitted in printing]

APPENDIX W

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

November 14, 1988

Robert F. Vacchelli, Esquire
Assistant Attorney General of Connecticut
110 Sherman Street
Hartford, Connecticut 06105

Re: 88-449) – John F. Healy, et al. v. The Beer Institute, et al.
88-513) – Wine and Spirits Wholesalers of Connecticut, Inc.
) v. The Beer Institute, et al.

Dear Mr. Vacchelli:

The Court today entered the following order in the above consolidated cases:

> "In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument."

Enclosed are memorandums describing the time requirements and procedures under the Rules. Inasmuch as the Court prefers to have the briefs well in advance of the argument, continuances of time to file briefs are not favored.

The additional docketing fee of $100.00 (Rule 45(a)) is now due and payable in No. 88-449.

Very truly yours,

JOSEPH F. SPANIOL, JR., CLERK

/s/ Sandy Nelsen
Sandy Nelson
Assistant Clerk

Enclosures